

STATE OF MICHIGAN
ATTORNEY DISCIPLINE BOARD

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GRIEVANCE ADMINISTRATOR,
STATE OF MICHIGAN,
ATTORNEY GRIEVANCE COMMISSION,

Petitioner-Appellant,

-vs-

#09-047-GA

MICHAEL L. STEFANI,

Respondent-Appellee.

RESPONDENT'S BRIEF ON REVIEW

STATEMENT OF FACTS

[Page references in parenthesis are to pages of the transcripts of proceedings before the hearing panel.]

Proceedings below. Mr. Stefani was charged in this matter with violating MRPC 3.4(c) for issuing a subpoena *duces tecum* without timely serving the subpoena on opposing counsel and for failing to have the subpoenaed materials delivered directly to the trial judge as the judge had previously directed. After a lengthy hearing, the panel determined that Mr. Stefani violated MRPC 3.4(c) as charged – and as he candidly admitted – and that two other charges brought against him had not been established.

Following a further hearing and the presentation of argument as to sanction, the panel, in a thoughtfully written opinion, determined that the appropriate level of discipline was a reprimand.

Relevant facts. Mr. Stefani has been a member of the State Bar since 1969 and has no prior discipline record. In addition to practicing law with distinction, he has had a distinguished career in law enforcement, as a special agent of the Federal Bureau of Investigation, police chief for the

City of Lake Angelus, a member of the Detroit Police Department and an instructor at the Oakland Police Academy (11/12/09 – 162-163). For many years, Mr. Stefani's law practice has focused on business law, real estate, commercial litigation and estate planning (11/12/09 – 164-165). He has received numerous awards for his activities in law and law enforcement (11/12/09 – 167; Exhibit A). He has also served as an Attorney Discipline Board hearing panelist since 1989 (11/12/09 – 168).

Beginning in the 1990s, Mr. Stefani developed expertise in whistleblower litigation. When Detroit Police Department Deputy Chief Gary Brown was fired in 2003 by Mayor Kwame Kilpatrick in apparent retaliation for Brown's investigation of possible misconduct by officers in the Mayor's Executive Protection Unit, Brown asked Mr. Stefani, with whom he had worked on a narcotics task force for many years, to represent him (11/12/09 – 172-174). Shortly thereafter, Officer Harold Nelthrope, who had been identified as the member of the Executive Protection Unit who had reported the matters to Internal Affairs that Brown was investigating, asked Mr. Stefani to represent him, too (11/12/09 – 172-174). Mr. Stefani agreed to take on their case and soon thereafter filed a Whistleblower Protection Act lawsuit in Wayne Circuit Court (11/12/09 – 172-174).

After learning in the course of discovery that the mayor regularly used text messages to communicate with staff, in August 2004 Mr. Stefani issued a subpoena to Skytel to obtain copies of text messages sent or received by the mayor or Christine Beatty for a two-month period in 2002 and a two-month period in 2003. The subpoena, which was timely served on the defendants, called for production of the records for photocopying at the office of a court reporter (Exhibit 1). Following a hearing on a motion to quash filed by the mayor and the City, Judge Callahan ordered that Skytel send the messages to him so that he could review them *in camera* to determine whether any portion

was protected by the defendants' asserted government deliberative process privilege (10/8/09 – 35-36; 12/4/09 – 11). Mr. Stefani then sent out a new subpoena conforming to Judge Callahan's order (Exhibit 4).

After the revised subpoena was sent out, Mr. Stefani became involved in other time-consuming aspects of the case, and he did not check back with Judge Callahan to determine whether the text messages had, in fact, been delivered to the court (11/12/09 – 179).

After multiple, complex interlocutory appeals, the case finally came to trial in August 2007 (11/12/09 – 180). During Mr. Stefani's examination of Beatty, he asked whether she had ever sent a text message to or received a text message from the mayor regarding Brown's termination, the release of the confidential Internal Affairs memo naming Nelthrope or of a personal, romantic or sexually explicit nature (11/12/09 – 78). When Beatty answered each of Mr. Stefani's questions in the negative, he asked Judge Callahan if he would allow the text messages to be introduced to impeach those answers. The judge stated that he was inclined to admit them but didn't have them and thought that Mr. Stefani had them (10/8/09 – 48-50). He later told the attorneys to have Skytel re-submit the text messages without specifying to whom they were to be sent (10/8/09 – 61).

When Mr. Stefani tried to have Skytel re-deliver the messages, he found out that Skytel had undergone a re-organization and was initially told that the messages were no longer available (10/8/09 – 59, 62). Mr. Stefani then directed his investigator to try to locate the former Skytel employee whose name was on the original subpoena while he addressed other issues relating to the case (10/8/09 – 59, 62, 69). Near the end of the trial, Judge Callahan offered an adjournment if either side still wanted to try to obtain the text messages (10/8/09 – 59-62, 66-69). Neither side took up the judge's offer.

At the conclusion of trial, the jury returned a verdict for Brown and Nelthrope in the amount of \$6.5 million plus pretrial interest of approximately \$1.45 million (10/8/09 – 58; 11/12/09 – 190-191). A couple of weeks later, Mr. Stefani's investigator located the former Skytel employee, who told him he had not delivered the messages in 2004 because a woman from the City had contacted Skytel and told them not to send the messages to Judge Callahan because the City had filed another motion to quash the subpoena (10/8/09 – 59, 66, 68-69, 72). The former employee stated that the records were, in fact, still available and gave the investigator the information needed to track them down (10/8/09 – 60, 69). Mr. Stefani then sent a third subpoena to Skytel on September 25, 2007, and when that subpoena did not result in production of the text messages, he sent a fourth subpoena a couple of days later. Both the third and the fourth subpoenas directed Skytel to submit the text messages directly to Mr. Stefani's law offices (Exhibits 6 and 7).

~~Mr. Stefani did not serve copies of the third or fourth subpoenas on the defendants until~~ October 17 (10/8/09 – 94; 11/12/09 – 39). He was very concerned that, if the defendants were given another chance to prevent production of the text messages, the messages would never see the light of day and that if that happened, it would perpetuate the mayor's unfounded claim that the Brown/Nelthrope verdict was the result of the jury's racial composition (10/8/09 – 72, 75-77, 85; 11/12/09 – 21, 233-234).

Mr. Stefani candidly acknowledged that, although he felt morally justified in not serving the defendants with copies of the Skytel subpoenas after the trial was over, he understood that being morally justified did not excuse ignoring a court rule. He also testified that he was prepared to accept the consequences for having violated the court rule (10/8/09 – 75-76; 11/12/09 – 22-23).

With respect to having the text messages delivered directly to him rather than submitted to

the court first for an *in camera* review, Mr. Stefani's error was the result of a misunderstanding as to whether Judge Callahan's order remained in effect. He would not have knowingly violated the court's order, but he realizes in retrospect that his thinking at the time was not what it should have been. As he stated during the hearing, "in hindsight, I didn't use the best judgment", "in hindsight today, I can see that, you know, I may have begin – been incorrect in my belief that the purpose of the order had been fully satisfied" (10/8/09 – 79, 82).

Judge Callahan testified that if the text messages had come to him during trial, "that was absolutely going to the jury" (12/4/09 – 8). He didn't think they were privileged then or now (12/4/09 – 11-12). Samuel McCargo, the then-mayor's attorney at the time, did not seek any remedial action after learning that Mr. Stefani had obtained copies of the text messages; he agreed that Judge Callahan would have allowed the text messages to be introduced into evidence at the trial (11/18/09 – 51-52).

ARGUMENT

GIVEN MR. STEFANI'S LONG, UNBLEMISHED AND DISTINGUISHED HISTORY IN PRACTICE AND PUBLIC SERVICE, GIVEN THAT HE FULLY ACCEPTED RESPONSIBILITY FOR HIS MISCONDUCT BEFORE THE HEARING PANEL, AND GIVEN THE ABSENCE OF ANY AGGRAVATING CIRCUMSTANCES AND PRESENCE OF NUMEROUS SIGNIFICANT MITIGATING FACTORS, THE HEARING PANEL PROPERLY FOUND THAT HIS ABERRATIONAL VIOLATION OF MRPC 3.4(c) WARRANTS ONLY A REPRIMAND.

Standard of review. In reviewing a hearing panel's decision, this Board considers the whole record to determine whether there is "adequate evidentiary support" on the whole record to support the panel's findings. MCR 9.115(J)(3) and (4); MCR 9.118(C)(1); Grievance Administrator v

August, 438 Mich 296, 304 (1991); In the Matter of Grimes, 414 Mich 483, 490 (1982).

With respect to the level of discipline, the Board possesses a measure of discretion in reviewing a hearing panel's decision, in order to carry out its overview function and maintain continuity and consistency in discipline. Grievance Administrator v Ebel, ADB #94-05-GA (1995), citing August, *supra*; Grievance Administrator v Brown, ADB #97-136-GA (1998).

Argument. The primary purpose of imposing sanctions in attorney discipline cases is not to punish the offending attorney but, rather, to protect the public, the courts and the legal profession. Grievance Administrator v Lopatin, 462 Mich 235, 244 (2000); MCR 9.102(A).

In order to further the goal of consistency in the imposition of sanctions, the Michigan Supreme Court in Lopatin directed that hearing panels apply the four-part analytical framework set out in the American Bar Association Model Standards for Imposing Lawyer Sanctions. A panel is to determine (1) the nature of the duty violated, (2) the respondent's state of mind at the time of the misconduct, (3) the injury or potential injury resulting from the misconduct and (4) any applicable aggravating and mitigating circumstances. The hearing panel in this case carefully and correctly fulfilled these responsibilities.

Duty violated. In the instant case, the duty violated was the duty not to abuse the legal process, and the hearing panel correctly found that the applicable standard is §6.22, which provides for a presumptive suspension in the absence of mitigating circumstances:

Suspension is appropriate when a lawyer knowingly violates a court order or rule, and there is injury or potential injury to a client or a party, or interference or potential interference with a legal proceeding.

Mr. Stefani's state of mind. With respect to Mr. Stefani's state of mind, the hearing panel properly determined that it was knowing. However, at the time he determined to delay serving the

third or fourth subpoenas on the defendants and wrongly concluded that Judge Callahan's order was no longer in operative, Mr. Stefani's thinking was not as clear as it usually is. Based on the City's apparent underhanded action in preventing delivery of the text messages to the court in 2004, Mr. Stefani was very concerned that if he gave the defendants another opportunity to prevent disclosure of the messages they might become lost forever as the result of "another dirty trick" (11/12/09 – 32).

His determination as to how to respond to this risk was out of character. His thinking was clouded as a result of both that earlier experience and the emotional drain of the lengthy, grueling trial he had just completed, a trial that was itself the culmination of a four-year, intensely fought legal battle. Moreover, Mr. Stefani's contention that he would not have knowingly violated the court's order is strongly supported by the fact that, near the end of the trial, when Judge Callahan offered him an opportunity to re-subpoena the text messages, he properly directed that the messages, if obtained, be delivered to the court, as evidenced by an August 29, 2007, email he sent to his paralegal, Roquia Draper asking that a new subpoena be prepared asking Skytel to "*deliver records to Judge Michael Callahan's courtroom*" (11/12/09 – 185-186; Exhibit B; emphasis added).

Injury or potential injury. The hearing panel also correctly determined that there was no actual injury from Mr. Stefani's action but that it did create a risk of potential injury (Discipline Report at pp 3-5). That risk was, however, extremely minimal given the specific circumstances of the case:

- a. Nothing in the text messages obtained by Mr. Stefani contained information protected by the government deliberative process privilege;
- b. Both Judge Callahan and Mr. McCargo agreed that the judge would have virtually certainly disclosed the text messages to Mr. Stefani had they been submitted for *in camera*

review;

c. Mr. Stefani's use of the text messages – which he utilized to assist in obtaining a fair settlement of the cases – did not interfere with either the trial, which had already concluded in his clients' favor, or with a possible appeal. Mr. Stefani reasonably believed that there was no viable basis for an appeal by the defendants, as all possible appellate issues had already been resolved by the interlocutory appeals; and

d. Mr. McCargo, too, was convinced that there were no viable issues for appeal, that the case would not be reversed on appeal and that if the case were appealed it would end up costing the City more money; Mr. McCargo had, in fact, recommended to the mayor that the case be settled before facilitation (11/18/09 – 48).¹

Aggravating or mitigating factors. Finally, with respect to aggravating and mitigating factors, the hearing panel properly rejected Petitioner-Appellant's arguments as to the former for the reasons set out in its Discipline Report at pp 6-7. The panel also correctly found that multiple mitigating circumstances are present, including Mr. Stefani's lengthy history in practice without prior discipline, the aberrational nature of the violation, the absence of a selfish or dishonest motive, fine character and integrity and a cooperative attitude throughout the proceedings. *Id.* at pp 6-8. The panel's conclusion-as to each of these factors is amply supported by the record.

In the course of his 41-year career as a member of the Bar, Mr. Stefani has no prior discipline record. §9.32(a). To the contrary, he has long been a credit to the Bar, with a strong record of public service in law enforcement and the broader community as well as to the Bar itself, including lengthy

¹Mr. McCargo also testified that, in his opinion, the case would have settled even if he had known that Mr. Stefani had furnished a copy of the text messages to the *Detroit Free Press* before execution of the October 17 Settlement Agreement (11/18/09 – 48).

service as an Attorney Discipline Board hearing panelist.

Mr. Stefani was not motivated by selfish interests. His desire in obtaining the text messages as he did was to bring closure to the underlying litigation for the benefit of his clients. In fact, Mr. Stefani offered during the facilitation discussion to forego substantial fees that he believed would have been awarded to him – a belief Judge Callahan confirmed (12/4/09 – 16-17) – in order to obtain a quicker favorable resolution for his clients. §9.32(b).

Mr. Stefani has been cooperative with the Attorney Grievance Commission in the course of its investigation. §9.32(e). Petitioner-Appellant's objection to the panel's determination that Mr. Stefani had been cooperative throughout the proceedings simply does not hold water: Not only did Mr. Stefani candidly admit to the only violation found against him *and* explain forthrightly his thinking process as to how he came to make such an uncharacteristic mistake, Petitioner-Appellant concedes that Mr. Stefani disclosed (to Commission counsel) prior to the first hearing date that he had given the text messages to the *Free Press*. Either of these acts standing alone would be sufficient to support the panel's conclusion that Mr. Stefani was cooperative. Publicly admitting one's error and announcing one's willingness to accept whatever consequences the panel deems appropriate is the epitome of a cooperative, highly professional attitude; the disclosure of this highly significant fact to Commission counsel, a courtesy Mr. Stefani was not required to extend, illustrated both a cooperative attitude a deep respect for the attorney discipline system as a whole.

Over the years, Mr. Stefani has earned an outstanding reputation for honesty and integrity throughout the metropolitan Detroit area, a reputation testified to in detail by his numerous, extremely credible character witnesses. §9.32(g). These witnesses included attorney and former FBI agent David Patton, who has known Mr. Stefani since they were in the same FBI training class

(11/18/09 – 61ff.), Sidney Frank, Mr. Stefani’s law partner for 25 years (11/18/09 – 64ff.), retired attorney and long-time ADB hearing panelist James Howlett, who has known Mr. Stefani since 1984 (11/18/09 – 67ff.), Gary Brown, Mr. Stefani’s client in the underlying litigation and recently elected Detroit City Councilperson (11/18/09 – 73ff.), William Baer, a prominent, locally active businessperson who has known Mr. Stefani for approximately 30 years (11/18/09 – 76ff.), James Bivens, chief investigator for the Wayne County Prosecutor’s office (11/18/09 – 79), Ira Todd, Jr., a veteran Detroit Police officer who has known Mr. Stefani for approximately 20 years (11/18/09 – 80ff.), Walter Foreman, an educator in the Detroit Public Schools who has known Mr. Stefani since 1989 (11/18/09 – ff.) and Angelo Iafrate, president of the Iafrate Construction Company, who has known Mr. Stefani since he (Iafrate) was a teenager (11/18/09 – 84ff.). Mr. Howlett’s testimony was representative of the views of each of these witnesses. Mr. Stefani is

a person of the highest professional character, highest standards of integrity, a person that the State Bar should be proud to have as a member and a person that – I know that community has the highest level of appreciation for what he’s done...

Id. at 72.

Mr. Stefani’s misconduct was truly aberrational in the course of a long career. It was an isolated event that occurred only after Mr. Stefani had devoted literally thousands of hours to the case, shortly after the conclusion of an emotionally draining, intensely fought trial at which Mr. Stefani was called upon to represent his client against multiple adversaries. It was an error that has not been repeated. It was an error for which, as noted above, he accepts responsibility and for which he is remorseful. §9.32(1).

Finally as to mitigating factors, in the circumstances of this case it is also significant that Mr. Stefani’s conduct once he obtained the text messages contributed materially to enormous public

good. His conduct in taking steps leading to the public disclosure of the text messages exposing the then-mayor's perjury was key to bringing an end to a profoundly corrupt, nationally embarrassing mayoral administration that was materially harming not just the City of Detroit but all of southeastern Michigan.

The appropriateness of a reprimand as the sanction to impose on these facts is further supported by the American Bar Association/Bureau of National Affairs publication Lawyers' Manual on Professional Conduct, a leading resource for ethics practitioners. As to misconduct of this nature, the Manual notes that:

Most courts impose a reprimand on lawyers who engage in misconduct at trial or who violate a court order or rule that causes injury to a client or other party, or who cause interference or potential interference with a legal process.

§01:833 (emphasis added).

~~A reprimand in these circumstances would also be consistent with decisions in comparable~~ Michigan cases. While the Supreme Court appropriately cautioned in Lopatin, supra, that each case must be decided on its own facts and that prior decisions are, therefore, of limited value, in the course of doing so it also stressed that "equivalent misconduct should be treated equivalently". *Id.*

In a Michigan case which appears to be extremely close to the facts at bar, the Commission agreed that a reprimand was the appropriate sanction. In Grievance Administrator v Conlon, ADB #00-159-GA, the respondent was reprimanded by consent for multiple violations including that he

... failed to comply with discovery demands; failed to honor the court's directive that privileged records be sent to the court and instead subpoenaed the records to be sent to his office; brought motions to quash information and limit the testimony of a prosecution witness well after the court's cutoff date; falsely advised the court that his motion to quash was filed late because the basis for the motion became clear to him only the night before trial...

(emphasis added; copy of notice attached).²

In the cases listed below, too, the respondent received a reprimand, often by consent, for violating MRPC 3.4(c):

- Grievance Administrator v Halbert, ADB #06-079-GA (2006) (consent discipline; respondent knowingly disobeyed an obligation under the rules of a tribunal);
- Grievance Administrator v Sabo, ADB #06-028-GA (2006) (consent discipline; respondent prepared documents and had his client execute them at a time when the client was subject to an order of full guardianship in probate court and, therefore, not competent to execute the documents);
- Grievance Administrator v Busse, ADB #04-036-GA (2004) (respondent engaged in the unauthorized practice of law in the U. S. District Court for the Western District of Michigan by appearing in a case in that district without having been admitted in the district and then repeatedly failing to take steps to become admitted in the district);
- Grievance Administrator v Price, ADB #03-162-GA (2004) (consent discipline; respondent failed to appear in court for a jury trial and was held in contempt as a result);
- Grievance Administrator v Lazar, ADB #03-004-GA (2003) (consent discipline; respondent, *inter alia*, released escrowed funds without the court's prior permission and knowingly disobeyed a court directive to hold the funds until receiving further direction from

²In contrast to the facts at bar, where the claim of privilege lacked merit, the records at issue in Conlon were a student's school records, which were clearly statutorily privileged. MCLA §600.2165. Moreover, both the U. S. and Michigan Supreme Courts had established procedures for *in camera* review by the court of presumptively privileged material sought by defense counsel in criminal cases long before Conlon's violation. Pennsylvania v Ritchie, 480 US 39 (1987); People v Stanaway, 446 Mich 643 (1994).

the court);

- Grievance Administrator v Garlington, ADB #00-96-GA; #00-110-FA (2001) (respondent engaged in multiple acts of misconduct, including failing to seek requisite court approval before withdrawing funds in a probate matter and defaulted in the ensuing attorney discipline case); and

- Grievance Administrator v Biretta, ADB #96-104-GA (1996) (consent discipline; respondent failed to appear in court as directed for two pre-trial conferences and failed to appear at his client's sentencing; when the court issued an order to show cause why he should not be held in contempt for his failure to appear at the sentencing, respondent falsely stated to the court that he had fully refunded the client's fee).

In summary, Mr. Stefani's representation of Gary Brown and Harold Nelthrope was a lengthy ordeal that frequently challenged his considerable skills, experience and judgment. The case presented complex legal issues and a host of highly incendiary political issues. To prevail in the case, Mr. Stefani had to overcome the numerous substantive defenses and procedural hurdles placed in his way by multiple defense attorneys. He met every challenge presented to him diligently, thoughtfully and ethically, with the sole exception of his handling of the final subpoenas *duces tecum* to Skytel in the fall of 2007. It is not insignificant that his error came only near the very end of this very lengthy representation and very shortly after the emotional stress and drain of an extremely hard-fought trial. As he acknowledged at the hearing, in hindsight he used bad judgment in deciding not to serve the subpoenas on opposing counsel and in having the text messages delivered directly to him rather than to the court. He deeply regrets these errors.

Finally, it is also appropriate to consider whether Mr. Stefani is likely to commit this or any

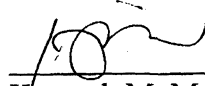
other misconduct in the future. To this question, the answer is a resounding “no”. As proud as he rightfully is of his overall legal work on behalf of Mr. Brown and Mr. Nelthrope, Mr. Stefani also takes deeply to heart the fact that he allowed his judgment to be flawed and that, as a result, he engaged in professional misconduct. The error occurred three years ago and has not been repeated, and the Board can be assured that there will not be any repeat of this misconduct.

Following the Supreme Court’s admonition from Lopatin, *supra*, that while hearing panels are to follow the ABA Standards, that directive “is not an instruction to abdicate their responsibility to exercise independent judgment”, 462 Mich at 248, n 13, the hearing panel properly considered Mr. Stefani’s error in the context of his stellar overall career and outstanding overall representation of Brown and Nelthrope. In further light of the fact that discipline is imposed not for the primary purpose of punishment but, rather, to protect the public, the facts in this case strongly support the panel’s decision to impose a reprimand.

RELIEF REQUESTED

For all of these reasons, the hearing panel properly determined that a reprimand is the appropriate level of discipline in this case, and that decision should be affirmed.

Respectfully submitted,



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Dated: September 24, 2010

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-vs-

#09-047-GA

MICHAEL L. STEFANI,

Respondent.

PROOF OF SERVICE

Kenneth M. Mogill, being first duly sworn, deposes and states that on September 24, 2010, he served a copy of

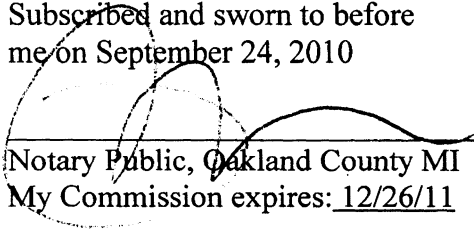
Respondent-Appellee's Brief on Review

upon Robert E. Edick, Esq., Attorney Grievance Commission, #256, Marquette Building, 243 W. Congress, Detroit, MI 48226 by depositing same in the United States mail, postage fully prepaid thereon.



Kenneth M. Mogill

Subscribed and sworn to before
me on September 24, 2010



Notary Public, Oakland County MI
My Commission expires: 12/26/11