STATE OF MICHIGAN

# Attorney Discipline Board



Grievance Administrator,

Petitioner/Appellee,

v

Mark A. Chaban, P 57799,

Respondent/Appellant.

Case No. 15-151-GA

Decided: December 19, 2018

*Appearances*

Kimberly L. Uhuru, for Grievance Administrator, Petitioner/Appellee
Mark A. Chaban, In Pro Per, Respondent/Appellant

## BOARD OPINION

Tri-County Hearing Panel #21 of the Attorney Discipline Board issued an order on October 9, 2017, suspending respondent's license to practice law in Michigan for a period of one year and requiring respondent to pay $30,973.75 in restitution. Respondent filed a petition for review, arguing that the panel abused its discretion in admitting court records from the underlying litigation, that the panel's findings as to misconduct were not supported by the record, and that the discipline imposed was excessive. Respondent also filed a petition for stay, but respondent's request for a stay was denied by the Board on November 8, 2017. Respondent later filed a motion to stay payment of sanctions pending appeal, in which he requested a stay of his obligation to pay both the restitution ordered and the costs imposed. This motion was also denied by the Board. As a result, the order of suspension was effective October 31, 2017.

The Attorney Discipline Board has conducted review proceedings in accordance with MCR 9.118, including review of the evidentiary record before the panel and consideration of the briefs and arguments presented by the parties at a review hearing conducted April 18, 2018. Following its review, the Attorney Discipline Board has concluded that the order of discipline entered by the panel should be affirmed.

## I. Background

This matter arises out of respondent's representation of a defendant, Christopher Schwartz, in a 36th District Court case, wherein the plaintiff therein sought termination of Schwartz's tenancy in a house plaintiff owned. Respondent filed a counterclaim seeking $750,000 in damages. Ultimately both the principal claim and counter claim were dismissed, because of a faulty notice to quit.

Respondent appealed the dismissal of the counterclaim. After serving a proper notice to quit, Ryan Hill, attorney on behalf of the plaintiff, re-filed the case and respondent re-filed his counterclaim. Ultimately, a judgment for plaintiff was entered, plaintiff was granted possession and defendant was ordered to move out of the premises. Respondent appealed the judgment for defendant. Meanwhile, although the plaintiff boarded up the property to prevent vandalism, respondent allegedly advised defendant to cut the locks and retake possession. Respondent also advised a court officer that the officer could not secure the property because an appeal bond had been filed, which was untrue.

Attorney Hill filed a motion against respondent for sanctions for filing a vexatious appeal. Judge Susan Borman determined that no proper appeal bond had been presented or filed. Judge Borman also awarded sanctions against defendant and respondent for filing a vexatious appeal in the amount of $6,448.75. Judge Borman gave the keys to the property to Attorney Hill. Attorney Hill then filed a motion in district court to release the escrow funds to plaintiff. At the hearing on that motion, Judge Michael Talbot questioned respondent about the procedural history. Respondent represented to Judge Talbot that he had motions for reconsideration and for contempt pending before the court, which was untrue. When respondent was asked why the escrow funds should not be released, he advised the judge that the defendant, not the plaintiff, had prevailed in the underlying matter. Judge Talbot concluded that respondent had been selective in presenting information, and ultimately released the escrow funds to the plaintiff and set an appeal bond.

Respondent filed an appeal of this decision but did not pay the appeal bond. Attorney Hill filed another motion for sanctions against respondent for filing a vexatious appeal. Just prior to the motion hearing, however, respondent filed for bankruptcy. At the hearing on the motion for sanctions, Judge Borman stated that this was "one of the worst cases I've ever seen of delay," and ordered sanctions against respondent in the total amount of $24,525. This order was stayed due to respondent's pending bankruptcy.

Respondent filed appeals of both sanction orders to the Court of Appeals and the Supreme Court, which were all dismissed. The Bankruptcy Court determined that the orders for sanctions should not have been stayed; respondent appealed this decision to the U.S. District Court for the Eastern District of Michigan, which affirmed the Bankruptcy Court's order. In 2016, respondent was incarcerated in the Wayne County jail for 90 days for civil contempt, because of his inability or refusal to pay the sanctions levied against him.

Based upon this conduct, the Grievance Administrator filed a formal complaint against respondent, alleging respondent violated the following Rules of Professional Conduct: (1) MRPC 3.1, for filing frivolous pleadings; (2) MRPC 3.2, for failing to make reasonable efforts to expedite litigation; (3) MRPC 3.3(a), for making knowingly false statements of material fact to a tribunal; (4) MRPC 4.1, for knowingly making a false statement of material fact to a third person; and (5) MRPC 8.4(b) and 8.4(c), for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation, and for engaging in conduct prejudicial to the administration of justice. The complaint also asserts violations of 9.104(1), (2) and (3).

## II. Discussion

Respondent first argues the hearing panel abused its discretion by admitting court records from the underlying litigation. We disagree.

The admissibility of evidence is within the sound discretion of the trial court and will not be reversed unless the trial court abused its discretion. *People v McDaniel*, 469 Mich 409, 412 (2003). Whether a document has been properly authenticated is also a matter within the trial court's discretion. *Champion v Champion*, 368 Mich 84, 87-88 (1962). An abuse of discretion can be found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made. *People v Williams*, 240 Mich App 316, 320 (2000).

Here, all of the exhibits introduced were either public records or supported by testimony. At the very least, it was reasonable for the hearing panel to conclude that the proffered court records are what petitioner claimed them to be. Although the court records were not "certified" copies, there was sufficient evidence presented to conclude the documents presented were copies of "a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office" and are "from the public office where items of this nature are kept." MRE 901(b)(7). Attorney Hill, who

was opposing counsel in the underlying proceedings and thus had personal knowledge of all of the court records at issue, identified every exhibit prior to admission by the panel.

Lastly, even if it was an error to admit the court documents, respondent was not prejudiced by their admission. As such, declining to grant relief is not inconsistent with substantial justice. MCR 2.613 provides, in pertinent part:

> Harmless Error. An error in the admission or the exclusion of evidence, an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice. MCR 2.613(A).

See also *Chastain v General Motors Corp*, 467 Mich 888 (2002). Similarly, MCR 9.107 provides that a discipline proceeding "may not be held invalid because of a nonprejudicial irregularity or an error not resulting in a miscarriage of justice." MCR 9.107(A). Likewise, MRE 103(a) states that "error may not be predicated upon a ruling which admits or excludes evidence, unless a substantial right of the party is affected."

It was well within the hearing panel's discretion to accept Attorney Hill's assertions and the document markings themselves as evidence of the documents' authenticity. Other than respondent's assertion that the documents are not admissible because they are not certified, respondent points to nothing within the documents themselves or in any other evidence that would indicate the documents are not authentic. However, even if the documents were admitted in error, their admission is not contrary to substantial justice and there is no evidence the respondent was prejudiced in any way. Accordingly, the hearing panel did not abuse its discretion in admitting the court records.

Next, respondent argues there was insufficient evidence to support the hearing panel's findings of misconduct. We again disagree.

In reviewing a hearing panel decision, the Board must determine whether the panel's findings of fact have "proper evidentiary support on the whole record." *Grievance Administrator v August*, 438 Mich 296,304; 475 NW2d 256 (1991). "This standard is akin to the clearly erroneous standard [appellate courts] use in reviewing a trial court's findings of fact in civil proceedings." *Grievance Administrator v Lopatin*, 462 Mich 248 n12 (2000) (citing MCR 2.613(C)).

Respondent was charged with violating MRPC 3.1, which provides that a lawyer "shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous." Under this rule, a lawyer has a duty not to abuse the legal process. Here, there was sufficient evidence for the hearing panel to conclude respondent abused the legal process in violation of MRPC 3.1. Although respondent contends the counterclaim and appeals he filed were not frivolous, two courts have already determined respondent filed vexatious appeals and respondent was sanctioned for such filings. Based upon the entire record and the evidence presented at the discipline proceedings, the hearing panel did not err in finding a violation of MRPC 3.1.

Respondent was also charged with violating MRPC 3.2, which provides that a lawyer "shall make reasonable efforts to expedite litigation consistent with the interest of the client." Again, the multiple vexatious appeals filed by respondent support the finding of a violation of MRPC 3.2.

The hearing panel also determined respondent was in violation of MRPC 3.3(a) for making knowingly false statements to a tribunal. There are at least two examples in the record where respondent made misrepresentations to the court. First, at the hearing on plaintiff's motion to release escrow, respondent informed the judge that there were still two pending motions: a motion for contempt and a motion for reconsideration. This statement was false, however, since the underlying case had been adjudicated and subsequently dismissed. (Petitioner's Exhibit 26, p 5.) Second, in the same hearing, respondent told the judge the escrow funds should not be released to the plaintiff because respondent's client had prevailed in the litigation, which also was not true. (Petitioner's Exhibit 26, pp 6-8.) At the time these statements were made, respondent knew his counterclaim had been dismissed in its entirety, the plaintiff had been granted possession of the property, and respondent's client had been ordered to vacate the premises. Therefore, in both situations, respondent's statements to the court were knowingly false and misleading. Accordingly, the hearing panel's conclusion that respondent violated MRPC 3.3(a) is supported by the record.

Respondent was likewise found to have violated MRPC 4.1, which prohibits a lawyer from knowingly making a false statement to a third person. Here, the Grievance Administrator presented evidence that respondent made false statements to the court officer who was attempting to enforce the eviction. (10/27/16 Tr, pp 58-61; Petitioner's Exhibit 18, pp 12-13, 15.) Based upon this evidence, the hearing panel had sufficient support to find respondent's false statements to the court officer constitute a violation of MRPC 4.1.

Respondent was also found to have violated MRPC 8.4(b), 8.4(c), and 9.104 (1),(2), and (3). MRPC 8.4 provides, in pertinent part:

> It is professional misconduct for a lawyer to:
>
> * * *
>
> (b) engage in conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law, where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer;
>
> (c) engage in conduct that is prejudicial to the administration of justice.

MCR 9.104 provides, in pertinent part:

> The following acts or omissions by an attorney, individually or in concert with another person, are misconduct and grounds for discipline, whether or not occurring in the course of an attorney-client relationship:
>
> (1) conduct prejudicial to the proper administration of justice;
>
> (2) conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach;
>
> (3) conduct that is contrary to justice, ethics, honesty, or good morals . . .

False statements to the court and to a court officer certainly fall under these rules. Furthermore, respondent's repeated filing of meritless appeals were prejudicial to the administration of justice. This was a simple eviction case that was stretched out for over four years, and consisted of multiple appeals to not only circuit court, but also the Michigan Court of Appeals, Michigan Supreme Court, United States District Court and the Sixth Circuit Court of Appeals. Therefore, there was sufficient evidence to support a violation of both MRPC 8.4 and MCR 9.104.

Finally, respondent asserts that the order of restitution was unsupported by the evidence and excessive. Once again, we disagree.

Based upon their finding of misconduct, the hearing panel suspended respondent's license to practice law for one year, and ordered respondent to pay restitution in the amount of $30,973.75

to Attorney Hill. On review, respondent merely asserts that the discipline imposed is "clearly excessive," but makes no mention of the length of his suspension, cites no case law, and cites no evidence in support of his argument that restitution is not supported by the evidence. Conclusory allegations are insufficient. Accordingly, these issues are considered abandoned on review. *Grievance Administrator v Frederick A. Patmon*, Nos. 93-47-GA; 94-157-GA (ADB 1997) (citing *Mitcham v City of Detroit*, 355 Mich 182, 203 (1959) and *Taunt v Moegle*, 344 Mich 683, 686-687 (1956)).

Nevertheless, the hearing panel's conclusion that a one-year suspension is warranted was appropriate. In exercising its overview function to determine the appropriate sanction, this Board's review is not limited to the question of whether there is proper evidentiary support for the panel's findings; rather, it possesses "a greater degree of discretion with regard to the ultimate result." *Grievance Administrator v Alexander H. Benson*, 08-52-GA (ADB 2010) (citing *Grievance Administrator v Eric S. Handy*, 95-51-GA (ADB 1996)). However, if the discipline ordered is not inappropriate, we frequently defer to the hearing panel's assessment of the proper level of discipline to be imposed. *Lopatin, supra* at 247 n 12.

In concluding that a one-year suspension was warranted, the panel properly relied on the American Bar Association Standards for Imposing Lawyer Sanctions (ABA Standards), namely ABA Standards 6.1 [False Statements, Fraud and Misrepresentation] and 6.2 [Abuse of the Legal Process]. Standard 6.12 states:

> 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.

Standard 6.22 states:

> Suspension is generally appropriate when a lawyer knows that he or she is violating a court order or rule, and causes injury or potential injury to a client or a party, or causes interference or potential interference with a legal proceeding.

The facts of this case fall squarely under Standards 6.12 and 6.22. In light of the panel's careful consideration of this matter at the misconduct and discipline phases, we see no reason to disturb the panel's determination as to the suspension imposed.

Furthermore, the authority of a hearing panel to order restitution as a condition of an order of discipline is explicitly set forth in MCR 9.106(5). Here, the Grievance Administrator presented sufficient evidence to support the restitution award. On June 28, 2013, the Wayne County Circuit Court determined respondent's appeal was vexatious and ordered $6,448.75 in sanctions against respondent to cover Attorney Hill's fees incurred by having to respond to the vexatious appeal. Then on August 5, 2014, the same court granted plaintiff's motion for sanctions against the defendant and respondent, determined respondent's appeals were vexatious, and awarded the plaintiff $24,525 in sanctions against the defendant and respondent. These two sanction awards total $30,973.75 - the exact amount of the restitution ordered by the hearing panel. For these reasons, there can be no error found in the hearing panel's restitution award.

## III. Conclusion

Respondent caused delay throughout the proceedings by taking what should have been a simple landlord-tenant matter and turning it into an extended, time consuming, fee-increasing endeavor. Respondent sought to litigate and appeal virtually every issue that arose, even when there was no merit in doing so. For these reasons, respondent is a danger to the public, the courts, and the legal process.

No error or abuse of discretion occurred with regard to the evidentiary rulings made by the hearing panel. Likewise, the hearing panel's findings of misconduct have proper evidentiary support in the record, and the panel's rationale for awarding restitution is similarly supported. As such, the hearing panel's findings of misconduct and its order of a one-year suspension with restitution is affirmed.

Board members Rev. Michael Murray, Barbara Williams Forney, James A. Fink, John W. Inhulsen, Jonathan E. Lauderbach, Karen O'Donoghue, Michael B. Rizik, Jr., and Linda S. Hotchkiss, M.D. concur in this decision.

Former Board Chairperson Louann Van Der Wiele was absent and did not participate.