STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellant,

v

Joseph Edward Ernst, P 69274,

Respondent/Appellee,

Case No. 14-116-GA

Decided: September 19, 2016

Appearances:

Alan M. Gershel and Dina P. Dajani, for the Grievance Administrator, Petitioner/Appellant
Joseph Edward Ernst, In Pro Per, Respondent/Appellee

BOARD OPINION

While representing a criminal defendant awaiting trial in Ingham County Circuit Court, respondent told his client that he had hired an investigator, and that the investigator had performed services in furtherance of his case. Respondent has admitted that he knew the statement to be false at the time he made it. Accordingly, the hearing panel found that respondent's false statement to his client violated MRPC 8.4(a) and (b) and MCR 9.104(2)–(4), and held that a reprimand was the appropriate level of discipline, given the particular circumstances of this case. The Grievance Administrator filed a petition for review challenging the level of discipline as insufficient for the misconduct committed. The Attorney Discipline Board has conducted review proceedings in accordance with MCR 9.118. For the following reasons, the Board finds that the panel did not err in imposing an order of reprimand, and therefore the decision is affirmed.

I. Panel Proceedings

In April 2013, respondent was appointed to represent Scott A. Sylvester in a criminal case in Ingham County Circuit Court. Mr. Sylvester was incarcerated and awaiting trial on three felonies, including armed robbery, assault and attempt to commit murder. Respondent testified that he did a substantial amount of work on the case for approximately three months. In July 2013, respondent

filed a motion with the court seeking authority to pay a private investigator to assist with the case. The court granted the motion and authorized payment to the investigator.

After this initial period of work, respondent failed to meet or otherwise communicate with his client for approximately six months. When respondent finally met with his client in January of 2014, he relayed a plea offer to Mr. Sylvester, but advised him not to accept it. In the course of their conversation, Mr. Sylvester asked about the investigator. Respondent falsely told him that the private investigator had done some work on the case, and that he would give him more information the following week. At the time respondent made this statement, the investigator had not done any work on the case, because in respondent's words, he had not "activated" him yet. About one week after the January jail visit, Mr. Sylvester retained other counsel and requested that respondent withdraw from the case.

The formal complaint in this matter alleges that respondent failed to keep Mr. Sylvester reasonably informed about his matter in violation of MRPC 1.4(a) and (b), and that he made a false statement to Mr. Sylvester, in violation of MRPC 8.4(a) and (b) and MCR 9.104(2)–(4). Respondent admitted that he lied to his client. However, he argued that the misrepresentation was "reactive" and "spontaneous," as opposed to intentional and malicious. Respondent testified that he did not go to the January meeting with the intention of deceiving his client, and further, his client did not make any decisions regarding his case based on this misrepresentation. Respondent also stated that Mr. Sylvester had a strong case with or without the investigator, and during the six-month lapse in communication, he had done everything that he could to move the case along.

The panel found that respondent committed misconduct by engaging in conduct involving dishonesty or misrepresentation, reflecting adversely on his honesty, trustworthiness, or fitness as an attorney, in violation of MRPC 8.4(b), as well as violations of MRPC 8.4(a) and MCR 9.104(2)–(4), and issued an order reprimanding respondent.

In the section of the report addressing the discipline to be imposed, the panel wrote a thoughtful and detailed discussion of the application of Standard 4.6 of the ABA Standards for Imposing Lawyer Sanctions. Among other things, the panel stated:

> At the hearing, Petitioner argued: "We are speculating here, but the potential harm might be to agree to a certain resolution, a certain course of conduct based on the findings of what might be from the investigator." (Tr 2/19/15, p 42.) Yet, Petitioner also acknowledged that there is no evidence that Respondent made the misrepresentation

> in an effort to have the client take a certain course of conduct or follow certain recommendations. (Tr 02/19/15, p 40.)
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> The Panel recognizes that the very nature of the term "potential" always requires some level of speculation, but the level of speculation required varies based upon the specific facts considered. For instance, the potential for injury is greater if one drives through a red light at an intersection than if the light is green. Under the facts of this case, time remained to "activate" the retained investigator, for him to perform his duties and deliver his findings, and to consider appropriate action based upon those findings. Respondent's misrepresentation did not prevent any of that from happening.[1] The Panel finds that, based on these facts, it is possible on a purely speculative basis to come up with scenarios which present "potential injury." But the true potential for injury in this case was *de minimus*.
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> [1] As it played out, Respondent's client terminated Respondent's representation shortly after the misrepresentation was made. Represented by new counsel and knowing he had a right to the investigator's findings, the client apparently chose to accept a plea without first having the private investigator perform his duties and deliver his work product for consideration by the client. (Tr 02/19/15, pp. 20-22, 52-53.)
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> [HP Report 9/9/2015, pp 5-6.]

The hearing panel also wrote:

> Based on the record, the Panel finds that in this case Respondent engaged in an isolated instance of knowing (but not deliberate) action in failing to provide a client with accurate or complete information which caused little or no actual or potential injury to the client. [*Id.*, p 6; emphasis in original.]

The panel then distinguished the various potentially applicable Standards based on the lawyer's state of mind, explored the meaning of "potential injury," thoroughly discussed case law, properly concluded that admonition and "no discipline" would not be appropriate here, and considered the aggravating and mitigating factors.

The Grievance Administrator filed a petition for review, arguing that a suspension is warranted under the ABA Standards and Board precedent in light of respondent's knowing misrepresentation to his client.

II. Discussion

The Board reviews a panel's findings of fact for "proper evidentiary support on the whole record." *Grievance Administrator v Lopatin*, 462 Mich 235, 247–248 n 12; 612 NW2d 120 (2000). However, we have broader discretion to review disciplinary decisions and modify them if necessary to ensure a level of uniformity and continuity in discipline imposed for similar violations. *Grievance Administrator v Brent S. Hunt*, 12-10-GA (ADB 2012), p 7.

ABA Standard 4.62 provides, "Suspension is generally appropriate when a lawyer knowingly deceives a client, and causes injury or potential injury to the client." The text of the individual specific standards represents an attempt to arrange the factors set forth in Standard 3.0 (the duty violated, the lawyer's mental state, actual or potential injury caused, and aggravating and mitigating factors) in a framework offering general recommendations as to presumptively appropriate discipline for many violations of professional duties. In addition to considering these factors and that framework, the Court has urged panels and the Board to consider precedent when applying the Standards. *See Lopatin*, 462 Mich 235 at n 13.

We recently made the following observation:

> A suspension of at least 180 days is generally appropriate when a lawyer has knowingly deceived his or her client about the status of the client's case. *Grievance Administrator v Harvey Zamek,* 07-34-GA (ADB 2008), citing *Grievance Administrator v Ann Beisch,* DP 122/85 (ADB 1988); *Grievance Administrator v Gary Wojnar,* 91-174-GA (ADB 1994); and, *Grievance Administrator v Perry T. Christy,* 94-125-GA (ADB 1996). [*Grievance Administrator v Donna Jaaskelainen,* 14-105-GA (ADB 2015), p 3 n 2.]

Yet, in our state, as in others, "misrepresentation has historically resulted in discipline ranging from reprimand to revocation," based on a particularized review of the facts and circumstances surrounding each case. *See Grievance Administrator v Krupp*, 96-287-GA (2002) (discussing two cases analyzed by the panel in this case involving misrepresentation to clients, one resulting in reprimand and the other in disbarment).

The panel's discussion in this matter perhaps provides needed refinement to our general declaration in the *Jaaskelainen* footnote. In its report, the panel discussed several cases, including a few involving suspension, one ordering disbarment, and one imposing a reprimand:

Petitioner has cited several cases in support of the proposition that a suspension is warranted in situations where a lawyer "knowingly" misrepresents something to a client. These cases are all distinguishable from this matter, however, because they all involve situations where there is a clear causal relationship between the misrepresentation and actual or potential injury to the client. See *Grievance Administrator v Mary E. Gerisch,* Case No. 171-87 (ADB 1988) (attorney fabricated documents and lied to a client regarding a case being settled to cover up her mishandling of the case [disbarment]); *Grievance Administrator v Perry T. Christy,* Case No. 94-125-GA (ADB 1996) (attorney told a series of lies both to his client and to the Grievance Commission and sought additional fees from a client to conduct discovery in a case that had been dismissed [one year]); *Grievance Administrator v Anne Beisch,* DP 122/85 (ADB 1988) (attorney misrepresented facts to client to hide that attorney had neglected two criminal appeals, and was misleading and deceptive in her response to the request for investigation [120 days, which then required reinstatement proceedings under MCR 9.123(B) and MCR 9.124]); *Grievance Administrator v Krupp,* Case No. ADB 96-287 (ADB 2002) (attorney made knowing misrepresentations to the Court and opposing counsel and obstructed opposing counsel's access to a document [90 days]).

In contrast to the cases cited by the Grievance Administrator, the Panel relied on *In the Matter of Jonathan Miller*, File No. DP 237/82 (ADB 1984) in which the Board imposed a reprimand in a case where Respondent Miller failed to adequately communicate the status of a probate estate to various parties and misrepresented the status to a client by indicating that the estate was closed when, in fact, it was not. In its opinion, the Board stated:

> The Board does not conclude that Respondent's misrepresentations were made to conceal improper or negligent conduct or to further any personal or pecuniary interest of the Respondent. Rather, a review of the entire record discloses that Respondent apparently made these misrepresentations to put a very anxious client at ease and with the belief that Respondent had taken almost all steps necessary for entry of a final order by the probate court. In addition to accepting Respondent's explanation in this regard, the Board finds that substantial weight should be given to the fact that Respondent has a long, unblemished record of professional practice.

Similarly, in the instant case, the Panel finds that Respondent did not make the misrepresentation to conceal improper or negligent conduct (as he was not negligent with respect to his representation of the client in the matter) or to further any personal or pecuniary interest. Rather, Respondent apparently made the misrepresentation to put an angry client at ease in the context where he felt guilty over his lack of contact with the client for over a month. (Tr 02/19/15, pp 17-18.) [HP Report 9/9/2015, p 7.]

Here, the panel found that the following mitigating factors existed in this case: absence of a prior disciplinary record (ABA Standard 9.32(a)); personal or emotional problems (ABA Standard 9.32(c)); full and free disclosure to disciplinary board or cooperative attitude toward proceedings (ABA Standard 9.32(e)); and remorse (ABA Standard 9.32(l)). Indeed, the panel found that respondent had been nothing but cooperative and was extremely remorseful during the proceedings.

Finally, the factor of injury or potential injury was a significant issue in the proceedings below. On review, the Administrator points to an apt definition in the Standards:

> "Potential injury" is the harm to a client, the public, the legal system or the profession that is reasonably foreseeable at the time of the lawyer's misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer's misconduct. [ABA Standards for Imposing Lawyer Sanctions (1986, amended 1992), p 7.]

As we have noted above, the panel found "little or no actual or potential injury to the client." In fact, the panel elaborated and found that "the true potential for injury in this case was *de minimus*" in the circumstances of this case. These findings were accompanied by additional determinations set forth earlier in the report:

> Respondent also expressed that he "sincerely felt bad about harming" his former client. (Tr 02/19/15, p 51.) When asked by the Panel about the nature of this "harm," Respondent explained that it was in the nature of "mental and emotional" harm "just thinking somebody is doing something on your behalf that they are not doing." (Tr 02/19/15, p 52.) Respondent clarified that he did do a lot of work, and had a trial book that was fairly complete. Respondent further stated that the lie did not harm his client's case. (Tr 02/19/15, p 52.) [HP Report 9/9/2015, pp 3-4.]

The Administrator's brief on review eloquently cautions against viewing injury and the potential for injury too narrowly in these circumstances:

> [I]t cannot be ignored that a lawyer's misrepresentation to a client, even if it does not actually harm the case, ultimately inflicts damage to the entire lawyer-client relationship. A client must be able to explicitly and implicitly rely on the lawyer's word. Trust can no longer exist when the lawyer lies to the client and the relationship becomes irretrievably harmed. Further, when a lawyer lies to a client it brings disrepute on the entire profession. [Petitioner's Brief, pp 7-8.]

After a careful review of record, and a close review of the panel's report, we are of the opinion that the panel's decision on discipline need not be disturbed. The panel's thorough consideration of the various relevant factors in this unusual case, including any actual harm to the profession's reputation occasioned by the particular misrepresentation of this practitioner, the potential harm to the client that it could have caused, mitigating factors (such as respondent's exceptional candor and remorse), and applicable precedent, have led to the imposition of a sanction within the range of appropriate outcomes for the misconduct in these circumstances.

III. Conclusion

For the foregoing reasons, we hold that the hearing panel did not err by imposing insufficient discipline in this case. Accordingly, we affirm the hearing panel's order of reprimand.

Board members Louann Van Der Wiele, Dulce M. Fuller, Rev. Michael Murray, John W. Inhulsen, Jonathan E. Lauderbach, and Barbara Williams Forney concur in this decision.

Board members Lawrence G. Campbell, Rosalind E. Griffin, M.D., and James A. Fink were absent and did not participate in this decision.