STATE OF MICHIGAN

Attorney Discipline Board

FILED
ATTORNEY DISCIPLINE BOARD
2021-Sep-17

Grievance Administrator,

Petitioner/Appellee,

v

Christopher S. Easthope, P-53097,

Respondent/Appellant,

Case No. 17-136-GA

Decided: September 17, 2021

Appearances

Jordan D. Paterra, for Grievance Administrator, Petitioner/Appellee
Brian D. Einhorn and Colleen H. Burke, for Respondent/Appellant

BOARD OPINION

Respondent was a judge at the 15th District Court from 2009-2015. This case arises out of respondent's conduct during his tenure as a judge and his friendship with attorney, Nader Nassif, who routinely appeared before him. Specifically, it was alleged, and the panel found, that respondent engaged in numerous ex parte communications and failed to disclose his personal friendship or disqualify himself from matters in which Mr. Nassif was involved.[1] The hearing panel below found multiple violations of Canons 2A and B; and Canon 3A(4)(a) of the Code of Judicial Conduct; MRPC 3.5(b); 8.4 (a)-(c); and, MCR 9.104(1)-(4) and ordered that respondent's license be suspended for one year, effective November 22, 2019. Respondent filed a timely petition for review and for a stay of the order of suspension. On November 21, 2019, the Board stayed the order of discipline on an interim basis, pending further consideration. On December 18, 2019, an order was

[1] Attorney Nassif was the subject of his own disciplinary proceeding arising out of his personal friendship with respondent, *Grievance Administrator v Nadar Nassif*, 17-137-GA. In that matter, the Grievance Administrator and Respondent Nassif consented to a 179-day suspension of Respondent Nassif's license to practice law, effective June 17, 2017.

entered granting the request for a stay of the panel's October 31, 2019 order of suspension. The Attorney Discipline Board conducted a virtual proceeding via Zoom video-conferencing, in accordance with General Order ADB 2020-1, and MCR 9.118, which included a review of the whole record before the panel, consideration of the parties' briefs and arguments presented. For the reasons discussed below, we affirm, in part, modify, in part, and reverse, in part, the challenged findings and conclusions of the hearing panel with regard to misconduct and we reduce the discipline imposed by the hearing panel to a suspension of 180 days, as further discussed below.

I. Panel Proceedings/Background

The hearing panel's report on misconduct recites the following facts:

> Respondent was elected to the bench in 2009 and served until he voluntarily resigned in 2015. (Tr 4/19/18, p 94.) His docket was limited to criminal cases. (Tr 4/19/18, p 95.) Nader Nassif was engaged by Model Cities Legal Services, the organization responsible for providing representation to indigent defendants. (Tr 4/19/18, p 96.) Mr. Nassif appeared before respondent frequently. His firm represented a substantial proportion of the indigent defendants. (Tr 4/19/18, pp 99-100.) Over time, respondent and Mr. Nassif became friends. (Tr 4/19/18, p 97.) The record shows that the two shared stories about their personal lives (often in crude, homophobic and sexist terms), and they periodically met for meals or drinks. Personal favors were exchanged . . . . It is clear that the relationship exceeded the limits of a professional interaction. The two were close friends. [Misconduct Report, 4/25/19, p 2.]

The Grievance Administrator filed a four-count formal complaint against respondent on November 16, 2017. The complaint alleged that respondent engaged in misconduct by participating in ex parte communications via text messages involving "scheduling favors," sentencing in certain cases, and other matters. The complaint also alleged that respondent should have disclosed his personal friendship with Mr. Nassif to litigants between 2010 and 2013 and that his failure to do so violated various rules of conduct and judicial canons. In another count, the complaint alleged that respondent disclosed certain information regarding Ann Arbor's contract negotiations with Mr. Nassif's firm for indigent representation and, at least, gave Mr. Nassif the impression that he could influence the Ann Arbor City Council's renewal of the indigent defense contract and award of back billings to Mr. Nassif's law firm. The complaint further alleged that respondent failed to accurately

respond to an Attorney Grievance Commission subpoena, and made a false statement regarding the subpoena in his sworn statement given during the Commission's underlying investigation of respondent's actions.

In his answer to the complaint, respondent admitted to texting with Mr. Nassif as set forth in the complaint; admitted to occasionally texting Mr. Nassif from the bench, but not while court was in session; admitted his friendship with Mr. Nassif; denied having any influence over the Ann Arbor City Council, as set forth in the complaint; and denied that he failed to accurately respond to the Commission's subpoena or that he made a false statement during his sworn statement.

The matter was assigned to Washtenaw County Hearing Panel #5. The panel ruled on a number of pretrial motions filed by both parties and misconduct hearings took place before the panel on April 19 and 20, 2018. After the misconduct hearings concluded, but before the panel's report on misconduct was issued, hearing panelist John Barr was replaced by panelist Corey Silverstein.[2]

Prior to the issuance of the hearing panel's report on misconduct, the parties filed a joint motion in which they requested that the proceedings, including the deadline for submission of briefs requested by the panel, be adjourned for 45 days as the parties were "attempting to resolve the issues before the hearing panel." On June 29, 2018, the panel issued an order that ordered the parties to simultaneously file their respective briefs or "to submit an alternative resolution to the panel" by August 15, 2018.

On August 9, 2018, the parties filed a pleading titled "Stipulation for Consent Discipline" specifically indicating that the stipulation was filed pursuant to MCR 9.115(F)(5). On September 7, 2018, the panel issued an order denying the stipulation for consent discipline and scheduling briefs. In the order, the panel reasoned that the procedure for consideration of a stipulation for consent order of discipline, as set forth in MCR 9.115(F)(5), did not apply because it is a prehearing procedure and required the parties to file the briefs previously requested by the panel. Included with respondent's brief was a motion for assignment to a new hearing panel. The Administrator's response concurred with respondent's request for reassignment. The motion was decided by the Board Chairperson pursuant to MCR 9.115(F)(2)(b), and denied in an order dated December 18, 2018, for the reason that respondent failed to establish grounds for disqualification under the

[2] Panel Member Silverstein did not participate in the drafting of the panel's report on misconduct, but did participate in the sanction hearing and in the drafting of the panel's report on sanction.

guidelines for consideration of the disqualification of a judge under MCR 2.003(C) and, based on objective and reasonable perceptions, the hearing panel's continued participation would not present a serious risk of actual bias impacting respondent's due process rights as enunciated in *Caperton v Massey*, 556 US 868; 129 S Ct 2252; 173 L Ed 2d 1208 (2009).

On April 25, 2019, the panel issued a comprehensive misconduct report, finding certain misconduct alleged in Counts One, Two, and Three, as will be discussed further below. The panel dismissed Count Four, finding that it was not proven by a preponderance of the evidence, and further concluded that several rule violations alleged in Counts One, Two, and Three were not established as a matter of law. The Grievance Administrator has not petitioned for review of those decisions.

A sanction hearing was held before the panel on June 25, 2019. Respondent testified on his own behalf and presented the testimony of five separate character witnesses. Respondent requested that the panel impose a reprimand. The Administrator urged a suspension of 180 days. And the hearing panel imposed a suspension of one year.

Respondent argues on review that: respondent should not be disciplined for his misconduct on the bench; "[t]he hearing panel had no basis to find that [respondent] engaged in ex parte communications"; the "panel had no basis to find that [respondent] had a duty to disclose his friendship with Nassif"; the panel imposed discipline inconsistent with the ABA Standards for Imposing Lawyer Sanctions; and that the hearing panel erred by not considering the parties' stipulation for consent order of discipline and by refusing to reassign the matter to a new hearing panel. Respondent requests that the Board "reverse the panel's findings of misconduct and their sanction determination." The Administrator requests that the Board affirm the hearing panel's findings of misconduct and the order of suspension.

II. The Hearing Panel's Findings of Fact and Conclusions of Law as to the Allegations of Misconduct

We review a hearing panel's factual findings for "proper evidentiary support on the whole record." *Grievance Administrator v Lopatin*, 462 Mich 235, 247-248 n 12; 612 NW2d 120 (2000); *Grievance Administrator v T. Patrick Freydl*, 96-193-GA (ADB 1998), and we review a hearing panel's decisions on the law under a *de novo* standard. *Grievance Administrator v Jay A. Bielfield*, 87-88-GA (ADB 1996); *Grievance Administrator v Geoffrey N. Fieger*, 94-186-GA (ADB 2002). Very few facts in this matter are in dispute. As indicated, in answer to the complaint, respondent did

not deny his friendship with Mr. Nassif or that he texted Mr. Nassif, as set forth in the formal complaint.

A. Count One – Evidentiary and Legal Support for the Panel's Findings and Conclusions that Text Messages Between Respondent and Nassif Constituted Misconduct.

Count One of the formal complaint specifically alleged that respondent engaged in impermissible ex parte communications with Mr. Nassif with regard to scheduling and scheduling favors, sentence length before sentencing hearings, changing a sentence for one of Mr. Nassif's clients, concealing discussions from the Washtenaw County Prosecutor, and favors for Mr. Nassif. The count alleged violations of Canons 2A, B and C, and 3A, B, and C of the Michigan Code of Judicial Conduct; MRPC 3.5(b), 8.3, and 8.4(a)-(c); and MCR 9.104(1)-(4). The panel found violations of Canon 2A and B; Canon 3A(4)(a) and C; MRPC 3.5(b) and 8.4(a)-(c); and MCR 9.104(4), "as respondent engaged in conduct which" . . . " reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer . . ." and was " prejudicial to the administration of justice." (Misconduct Report, 4/25/19, p 13.)

Of particular relevance here are Canons 2A, B and C and 3A(4)(a) of the Code of Judicial Conduct, which state, respectively, and in relevant part:

> **CANON 2. A Judge Should Avoid Impropriety and the Appearance of Impropriety in All Activities**
>
> A. Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. . . .
>
> B. . . .At all times, the conduct and manner of a judge should promote public confidence in the integrity and impartiality of the judiciary. . . .
>
> C. A judge should not allow family, social, or other relationships to influence judicial conduct or judgment. . .
>
> **CANON 3. A Judge Should Perform the Duties of Office Fairly, Impartially and Diligently**
>
> * * *
>
> A.(4) A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding, except as follows:

> (a) A judge may allow ex parte communications for scheduling, administrative purposes, or emergencies that do not deal with substantive matters or issues on the merits, provided:
>
> > (i) the judge reasonably believes that no party or counsel for a party will gain a procedural or tactical advantage as a result of the ex parte communication, and
> >
> > (ii) the judge makes provision promptly to notify all other parties and counsel for parties of the substance of the ex parte communication and allows an opportunity to respond.

Respondent argues that the hearing panel's conclusion that he engaged in improper ex parte communications should be reversed. Importantly, respondent does not deny that he engaged in ex parte communications with Mr. Nassif. Rather, he argues that these communications were not improper.

In the underlying proceedings, the Grievance Administrator relied on numerous text messages between respondent and Mr. Nassif to support the contention that respondent engaged in impermissible ex parte communication with Mr. Nassif. Although thousands of messages are contained within the exhibits offered by the Administrator, the panel only relied on the messages which the Administrator selected to support its complaint, as presented in Petitioner's Exhibits 1 and 4, and recited in their entirety on pages 3-6 of the panel's April 25, 2019, misconduct report. Respondent maintains that these conversations are not improper because the text messages concerned administrative issues; he did not provide any tactical or procedural advantage to Mr. Nassif, other attorneys were welcome to communicate with respondent by text, and the prosecutor's office waived its interest in post-plea sentencing matters, thus no notification of the substance of those communications was required.

To the contrary, our review of the relevant text messages reveals that they did not all concern merely scheduling or administrative issues. Respondent sent texts to Mr. Nassif to advise of what his client's sentences would be, to amend testing conditions, and to change a bond condition post plea. And, when the texts involved scheduling, the Canons were not followed. Mr. Nassif routinely sent text messages to respondent to call his cases early, respondent granted requests for adjournments made by Mr. Nassif by text message, and respondent sent Mr. Nassif text messages as reminders of court matters. Canon 3A(4)(a)(ii) required respondent to "promptly notify all other parties and

counsel for parties of the substance of the ex parte communication and allow an opportunity to respond," and this was not done.

Other than Mr. Nassif, respondent testified that no other attorneys texted him about when he would take the bench. (Tr 4/19/18, p 100.) Moreover, none of the other attorneys who practiced in the 15th District Court while respondent was on the bench recalled ever sending text messages to respondent about the substance of a case. (Tr 4/19/18, pp 177-180, 186, 197, 199; Tr 4/20/18, pp 384-386, 401-402, 418.) And, finally, while the Washtenaw County Prosecutor's office may have waived their right to be present for post-plea or sentencing issues, the Washtenaw County Prosecutor, Brian Mackie, testified that his office certainly did not waive prompt notification, as set forth in Canon 3A.(4)(a)(ii), of any ex parte communications that may occur during those proceedings. (Tr 4/19/18, p 44.) With regard to communication, Prosecutor Mackie further testified that:

> Well, my assistants don't text judges, to my knowledge. I don't think that happens. Maybe other witnesses will – will know something else, but generally speaking, it's like any other legal practice; you call a secretary. If you're late, you're in an accident, whatever, you call the Court's secretary. You don't text a judge on the bench. [Tr 4/19/18, p 88.]

As the Court noted in *Grievance Administrator v Lopatin*, 462 Mich 235, 257 (2000), every unlawful ex parte communication on the merits is injurious to the integrity of the legal system. Furthermore, ex parte communications deprive the absent party of the right to respond and be heard and they suggest bias or partiality on the part of the judge. Id. at 262. With regard to the text messages admitted here, the hearing panel made the following findings:

> On numerous occasions, Mr. Nassif communicated directly with respondent with regard to matters pending before him. Respondent likewise communicated directly with Mr. Nassif regarding pending matters. The interaction included requests that Mr. Nassif's matters be called ahead of those of other attorneys. **It included notice to Mr. Nassif that one of Mr. Nassif's clients would be sentenced to jail. And of particular concern, the two discussed a specific sentence to be imposed**. None of this communication was disclosed to anyone else. . .
>
> On January 11, 2012, Mr. Nassif and respondent discussed **whether a client would or would not be sentenced to probation. Specifically, Mr. Nassif said he "...wanted no probation." And respondent said "No probation=u buying drinks."** Respondent contended that both he and Mr.

> Nassif understood that communication of this sort was "a joke." (Tr 4/19/18, p 114.) But to a casual reader, this does not appear to be an attempt at humor. It appears to be an outright bribe. While there is no evidence that there was an actual exchange between the two parties, this discussion is precisely why ex parte communications are severely limited.
>
> The conversation between respondent and Mr. Nassif went well beyond mere scheduling or administrative matters and extended into substantive discussion of the decision that respondent was to make. None of these conversations were ever disclosed to the assistant prosecutor.
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> * * *
>
> The prosecutor's office could not waive an interest in discussions to which it was not a party, and about which, it was kept in the dark. It may be that the prosecutor's office would have had no objection to the decisions made by respondent. But no one will ever know because the communication between respondent and Mr. Nassif was conducted in secret. [Misconduct Report, 4/25/19, pp. 12, 13. Emphasis added.]

We find that the particular messages referenced in the hearing panel's report, (pp 3-6) support the panel's conclusion that respondent violated Canons 2 A and 3A(4)(a). While most of the text messages involved here did not deal with substantive matters or issues on the merits, the fact remains that some clearly did. Furthermore, the colorful, and at times offensive language of some of the messages supports the panel's finding that respondent failed in his duty to exercise good judgment, and avoid impropriety.

The test for determining whether there is an appearance of impropriety is "whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired." *Caperton*, 556 US at 888; *People v Aceval*, 486 Mich 887, 889 (2010). Here, applying this test, the panel concluded that:

> The content of the conversations exceeded that permitted by the Canon and, the conversations were not disclosed to the prosecutor's office, as required by the Canon.
>
> Respondent also. . . permitted his friendship with Mr. Nassif to create the strong appearance of impropriety. The interaction between the two, the extending of favors involving scheduling, the sharing of advance information regarding scheduling were unquestionably inappropriate. As mentioned elsewhere in this report, a reasonable member of the public could well question whether Mr. Nassif and his

> clients were given an advantage over other attorneys and whether respondent's decisions were the product of an unbiased view of the facts and the law. . . the known facts are so patent as to compel the conclusion that the interaction between respondent and Mr. Nassif was far outside the acceptable limits of judicial neutrality. [Misconduct Report 4/25/19, p 13.]

We concur with the hearing panel's conclusions in this regard. The fact is that a reasonable member of the public's perception of the judiciary and the legal profession would most certainly be negatively affected upon learning of respondent and Mr. Nassif's close friendship and of the contents of the text messages they exchanged over such a long period of time.

In conclusion, we find proper evidentiary support for the allegations characterized by the Administrator in his brief on review as "substantive pre-plea ex parte communications," "substantive post-plea ex parte communications," and improper ex parte communications regarding scheduling and administrative matters. These communications violated the Code of Judicial Conduct, Canons 2A, 2B, and 3A(4)(a), MRPC 8.4(c), and MCR 9.104(1), (2), and (4). We have reviewed the hearing panel's findings of misconduct and sanction report[3] and note that overall the panel did not make specific findings that respondent committed dishonest acts or that he corruptly changed the results in any case. Accordingly, we cannot find support in the record for a finding that respondent engaged in dishonest conduct, as referenced in MCR 9.104(3). Also, we cannot find support for a finding that respondent violated MRPC 3.5(b), which specifically deals with *a lawyer's* conduct in communicating with a judge, juror, prospective juror, or other official. The Grievance Administrator argues that it was misconduct for respondent to advise Mr. Nassif that he needed to file a motion "to be clean,"when Mr. Nassif asked respondent to set aside defaults entered against his client's parking tickets, as charged in Count One of the formal complaint, (¶¶ 40-42). It is not. Respondent's refusal to do Mr. Nassif the favor of setting aside the defaults in a parking ticket case without a motion and bond was appropriate. We therefore reverse the hearing panel's findings in this regard.

Finally, the hearing panel found no violation of MRPC 8.3 and Canon 3B(3), as charged in Count One, and that finding has not been appealed by the Grievance Administrator.

B. Count Two – Evidentiary and Legal Support for the Panel's Findings and Conclusions that Respondent Had a Duty to Disclose the Friendship

[3] In which, the hearing panel specifically found an absence of a dishonest motive.

Count Two charged that respondent committed misconduct by failing to disclose to litigants the extent of his relationship with Mr. Nassif between 2010 and 2013, during which time, the two went on a cruise with each other,[4] traveled to Chicago together, and respondent used Mr. Nassif as a cover and used his apartment in order to meet with a woman who was not his girlfriend. The count alleged violations of Canons 2A, B and C, and 3A, B, and C of the Michigan Code of Judicial Conduct; MRPC 3.5(b), 8.3, and 8.4(a)-(c); and MCR 9.104(1)-(4).

The panel concluded that respondent had a duty to disclose his friendship with Mr. Nassif and that his failure to do so created an appearance of impropriety and a lack of impartiality. The section of the panel's report on misconduct captioned "Findings regarding Count Two," which begins on page 14 of the report, do not analyze all of the rule violations alleged in Count Two. However, it seems clear that the panel -- understandably in light of its factual determinations -- focused on whether respondent failed to avoid the appearance of impropriety (Canon 2) and whether respondent engaged in conduct that "exposes the legal profession or the courts to obloquy, contempt, censure, or reproach (MCR 9.104(2))."

> It is probably something of a misnomer to assert that the violation here was the "failure to disclose" the friendship. It is more appropriate to describe these violations as causing substantial harm to the appearance of impartiality and neutrality of the justice system. It is clear from the admitted facts that respondent engaged in ex parte communication with counsel for a litigant. It is also clear from the admitted facts that the ultimate disclosure of the extent of the communication between respondent and Mr. Nassif could cause reasonable people to doubt the validity of the judicial system, and that the communication exposed " ... the legal profession or the courts to obloquy, contempt, censure, or reproach ... "
>
> Individuals learning of the years long personal interaction between respondent and Mr. Nassif would have good reason to wonder whether the 15th District Court could be trusted to fairly decide disputes, or whether there were other attorneys who were given favored treatment by judges. Respondent's conduct was likely unique and not mimicked by his colleagues. But, persons coming to that court could not know that. Instead, they could well wonder whether they could rely on the assigned judge to decide their case reasonably, if not, whether they made a mistake choosing counsel

[4] Respondent disputed that he and Mr. Nassif went on the cruise together. Rather, he acknowledged that he and Mr. Nassif were part of a group of approximately ten people who went on the same cruise. (Tr 4/19/18, pp 207-208, 341-342.)

> because their attorney was not as favored as was Mr. Nassif.
>
> A judge must maintain a professional distance between him/herself and the attorneys who appear before him/her. That is the reason that bench-bar conferences are conducted with care, and why judges should exercise extreme care if they become social friends with attorneys. It is that distance which ensures that the perception of the judicial system is protected. It may be that a judge could maintain a friendship with an attorney and still decide a case fairly. Indeed, that is respondent's argument -that he may have been friends with Mr. Nassif but he still decided his cases as a neutral. But that is not the conclusion that the public would likely draw once the extent of the interaction with Mr. Nassif became known. Rather, it appears to reasonable persons that Mr. Nassif was favored and that his clients got favored treatment. It is irrelevant whether that was or was not the case. It is clear that Mr. Nassif was able to manipulate respondent's schedule to Mr. Nassif's benefit. Mr. Nassif was informed about probable sentences in advance, and he was able to request that clients be given access to certain treatment programs.
>
> It may be that respondent's decisions were not impacted in any significant way by his friendship with Mr. Nassif, but that is not how the situation would have looked to an observer. To the contrary, it appears that respondent gave favored treatment to Mr. Nassif.
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> * * *
>
> As a result of respondent's failure to disclose his friendship with Mr. Nassif, the appearance of impartiality has been irreparably harmed. The panel concludes that petitioner has proven by a preponderance of the evidence that respondent's conduct violated MCR 9.104(1), (2), and (3) and MRPC 3.5(b), as set forth in Count Two of the formal complaint. [Misconduct Report, 4/25/19, pp 14-15.]

Respondent's position has been, both before the panel and now on review, that disclosure was unnecessary as it was common knowledge within the legal community in which he and Mr. Nassif worked, that they were friends. However, it soon became clear that the *extent of* the friendship was not "common knowledge" within the legal community. For example, Washtenaw County Prosecutor Brian Mackie testified that his prosecutors knew respondent and Mr. Nassif had a close friendship, however, they were all unaware of the extent of the relationship until the contents of the text messages were revealed.

> Q: Mr. Mackie, you knew that Nassif and – and Mr. Easthope were friends, didn't you?

> A: I have heard that.
> Q: I mean, your staff knew about the relationship, commented about it? It's not a big surprise, was it?
> A: No. . .
>
> * * *
>
> Q: Did they ever complain that he was giving Mr. Nassif's clients better results than anyone else?
> A: They complained about the closeness, yes.
> Q: Did they ever file a motion to disqualify him?
> A: No.
> Q: I mean, you could have; right?
> A: I don't know that we had enough at that point. **I didn't realize until seeing the text messages just how close they were.** I mean, drinking buddies is different to me than having an incredibly close relationship. [Tr 4/19/18, pp.46, 48-49. Emphasis added.]

Although respondent's witnesses testified that they were aware that respondent and Mr. Nassif were friends, it is apparent that the extent of the relationship was not truly revealed until the text messages were exposed. Given those revelations, we agree with the panel's conclusion that either disclosure to other litigants, or recusal from Mr. Nassif's matters was warranted:

> . . .no fact finder should engage in substantive communication with an advocate while a matter is pending. Moreover, no judge should maintain a close personal friendship with an advocate whose case he or she is judging without disclosing the relationship or giving serious consideration to recusal. Judges have the choice to become friends with other lawyers. But in such instances, they must be aware that reasonable people observing the process might conclude that the judge could not be impartial. [Sanction Report 10/31/19, p 9.]

"Judges are ordinarily in the best position to assess whether their impartiality might reasonably be questioned." (ABA Formal Opinion 488, p 2.) Had respondent undertaken a true assessment of the extent of his relationship with Mr. Nassif, we believe it likely that he would have concluded that disclosure of his friendship with Mr. Nassif, or recusal from Mr. Nassif's matters was warranted. Respondent conceded as much in his brief submitted to the panel in October 2018:

> Respondent asserted that the relationship between Respondent and the attorney was "common knowledge." Brief at 2. The communication by text message was a "reasonable means to accommodate the litigants

> and efficiently run a courtroom." Id. at 3. He concedes, however, that "In hindsight he should have recused himself from (the attorney's) cases and switched with one of his bench mates so as to avoid any appearance of impropriety." Id. at 3. [Sanction Report 10/31/19, p 4.]

The panel's report on misconduct regarding Count Two, starting on page 14 of the report, seems to include some of their conclusions regarding rules charged and violated relating to Count Three. We read the panel's report as focusing on the appearance of impropriety. The panel cites violations of other rules after discussion of facts present in the allegations pertaining to Count Three. The factual findings of the panel in both the report on misconduct and the report on sanction, do not find that there was any actual prejudice to the outcome of a case, or that a favor was done for a dishonest motive. Accordingly, the report does not support a finding of dishonesty, or a finding that respondent's conduct was prejudicial to the proper administration of justice, other than to the reputation of the court or the legal system, which the panel found was significant.

Therefore, the panel's conclusion that "respondent did not violate Canons 2 and 3 of the Code of Judicial Conduct," as set forth in Count Two of the formal complaint, is not fully supported by the evidentiary record presented. Rather, based on the panel's findings regarding harm to the appearance of impartiality and to public confidence, we find that the record establishes that respondent violated Canon 2.A, B, and C[5] of the Code of Judicial Conduct, as he failed to "avoid impropriety and the appearance of impropriety in all activities," and to "promote public confidence in the integrity and impartiality of the judiciary," MCR 9.104(1) and (4), and MRPC 8.4(a) and (c). We further find that violations of Canon 3B; MRPC 3.5(b), 8.3; 8.4(b); and, MCR 9.104(3), as charged in Count Two of the formal complaint, are not supported by the record.

C. Count Three –Evidentiary and Legal Support for the Panel's Findings and Conclusions Regarding the MCLS Contract

With regard to the Model Cities Legal Services (MCLS) contract, as set forth in Count Three of the formal complaint, the panel concluded that respondent "exposed the profession to censure and reproach by his failure to disclose his friendship with Mr. Nassif when advocating for the renewal of the MCLS contract, in violation of MCR 9.104(2)." The panel did not find violations of Canons 2

[5] Again, there is no finding that respondent corruptly altered the results in any case but he did improperly relax his procedures as a result of his social relationship with Mr. Nassif.

or 3 because "[respondent's] appearance before the City Council was outside of his adjudicative or administrative responsibilities as a judge," nor did they find violations of MRPC 3.5(b), 8.3, 8.4(a)-(d), and MCR 9.104(1), (3), and (4), as charged in Count Three. (Misconduct Report 4/25/19, pp. 15-17.)

Respondent testified that he and the other two judges at the 15th District Court collectively decided to obtain approval to pay the $203,000 in back billings submitted by Mr. Nassif's partner, who was retiring. Respondent admitted that he appeared at the subsequent city council meeting at which approval of the payment to MCLS was going to be discussed, but said he was only there to discuss the 15th District Court's budget. (Tr 4/19/18, pp 213-214.) However, respondent and Mr. Nassif engaged in conversations specifically about approval of the payment via text both before and during the city council meeting. (Formal Complaint ¶¶ 58, 61; Petitioner's Exhibit 1, pp 23, 259.)

We disagree with the panel's conclusion that Canon 2 does not apply to the allegations in Count Three. The canon clearly provides that "a judge should avoid impropriety and the appearance of impropriety in all activities." And, Canon 2A specifically indicates, in relevant part: "A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly." When respondent sent a text message to Mr. Nassif stating that he "owed him" approximately one minute after the contract was approved by the council, (Tr 4/20/18, p 428), he violated this canon. Despite respondent's testimony and argument to the contrary, to a reasonable member of the public these text messages would in our view, clearly imply that respondent had some influence on whether the contract would be approved for payment which in turn would directly benefit his friend. In *Attorney Grievance Commission of Maryland v Markey and Hanconck,* 230 A3d 942 (Md. 2020), an indefinite suspension of two attorneys, one of which was a Veterans Law Judge and the other an attorney-advisor to the Veterans Affairs Board, was entered when the two, for approximately seven years, participated in an exchange of email messages with a group of other employees to make inappropriate and offensive statements about others who were their colleagues. In that matter, the respondents contended that the comments made in their email messages did not violate MLRPC 8.4(d) (conduct that is prejudicial to the administration of justice), because the comments were intended to be humorous, and were made within a small circle of people, with the expectation that the comments would remain private. Before the panel, respondent also testified that

his conversations with Mr. Nassif were private and never intended to be distributed to the public. (Tr 4/20/18, p 372.) However, it is of no significance that respondent never intended the messages to become public, nor should it insulate him from the possible consequences of his actions.

The Administrator has not appealed the panel's findings and conclusions with regard to the violations charged in this count. However, we conclude that respondent's failure to disclose his friendship with Mr. Nassif to the Ann Arbor city council violated Canon 2A, as he did not "avoid impropriety or the appearance of impropriety in all activities," and we affirm the panel's finding that respondent violated MCR 9.104(2), as respondent's conduct "exposed the legal profession or the courts to obloquy, contempt, censure, or reproach," as set forth in Count Three of the formal complaint. We further find that violations of MCR 9.104(1) and (4), and MRPC 8.4(c) have been established.

III. The Appropriate Sanction for the Established Misconduct.

We next review whether the suspension imposed by the hearing panel is an appropriate and sufficient sanction for the misconduct established in this matter. Respondent argues that the one year suspension imposed by the panel is excessive and inconsistent with the ABA Standards and prior precedent of this Board and the Court. He urges the Board to impose "at most a reprimand," or alternatively, if the Board determines that a suspension is necessary, that it not exceed 30 days. (Respondent's Brief, p 27.) The Grievance Administrator argues that the one-year suspension imposed by the panel falls within the "range of acceptable discipline" previously imposed in *Lopatin*, *supra*, and *Grievance Administrator v Wade McCree*, 14-59-GA (ADB 2017)[6], and therefore it should be affirmed.

In *Lopatin*, the Court directed the Board and its hearing panels to utilize the ABA Standards in determining the appropriate level of discipline to impose when misconduct has been established.

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[6] Respondent Lopatin's license was suspended for 180 days for engaging in improper ex parte communication by providing a court of appeals judge with a supplemental legal memorandum analyzing two cases cited during oral argument without providing a copy of the memorandum to opposing counsel, the other judges on the panel, or filing it with the clerk of the court.

Respondent McCree's license was suspended for three years for engaging in an affair with a litigant while her case was assigned to his courtroom, communicating with the litigant and presiding over various aspects of the case during the course of his affair; failing to recuse himself for several months; presiding over a case involving a relative of the litigant with whom he was having the affair, and conferring with her before issuing a bond reduction in the matter; and, making false and misleading statements and representations to the Judicial Tenure Commission relating to his actions in those two cases.

Once the duty violated, the lawyer's mental state and the potential or actual injury caused by the lawyer's misconduct has been identified under ABA Standard 3.0, and the appropriate violated standard has been identified, the hearing panel may then consider the existence of aggravating or mitigating factors when determining the final sanction. Finally, as this Board noted in *Grievance Administrator v Ralph E. Musilli*, 98-216-GA (2000), in Michigan, the final step of the process involves a consideration of other factors, if any, which may make the results of the foregoing analytical process inappropriate for some articulated reason.

The standard of review for a panel's determination as to the appropriate level of discipline was discussed in *Grievance Administrator v David A. Reams*, 06-180-JC (ADB 2008), at p 2, which said:

> Although we afford a certain degree of deference to panel determinations as to the level of discipline imposed, this deference is less than that given to a finding of fact because this Board has an "overriding duty to provide consistency and continuity in the exercise of its overview function" with regard to sanctions. *Grievance Administrator v Rodney Watts*, 05-151-GA (ADB 2007). See also *Matter of Daggs*, 411 Mich 304, 319-320 (1981).

However, the Board traditionally does not disturb a panel's assessment unless it is clearly contrary to fairly uniform precedent for very similar conduct or is clearly outside the range of sanctions imposed for the type of violation at issue. The Court similarly defers. *Lopatin, supra*; *Grievance Administrator v Gregory J. Reed*, 10-140-GA (ADB 2014), at p 15; *Grievance Administrator v Jeffrey R. Sharp,* 19-80-GA (ADB 2020), at p 4.

At the hearing below, the Administrator argued for the imposition of a suspension of at least 180 days and respondent argued for the imposition of a reprimand. The panel concluded that "neither party made a persuasive case for its position." (Sanction Report 10/31/19, p 8.) With regard to the ABA Standards, the panel found Standards 5.22 and 6.32, both calling for suspension, to be particularly relevant.[7] Respondent maintains that the panel should have considered his conduct under

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[7] ABA Standard 5.22 states:

> Suspension is generally appropriate when a lawyer in an official or governmental position knowingly fails to follow proper procedures or rules, and causes injury or potential injury to a party or to the integrity of the legal process.

ABA Standard 6.32 states:

> Suspension is generally appropriate when a lawyer engages in communication with an individual in the legal system when the lawyer knows that such communication

ABA Standards 5.23 and 6.33, both calling for a reprimand because he did not "knowingly believe" that his communications with Mr. Nassif were improper, and because no injury actually occurred to a party, or to the integrity of the legal system.[8] Although it may be true that no actual harm occurred, except to the reputation of the legal system as discussed by the panel, the existence of potential harm to a party and therefore, even greater harm to the system itself was very real.

We find that no reasonable argument can be made that respondent was "negligent in determining whether it [was] proper to engage in communication with [Mr. Nassif]." ABA Standard 6.33. The mere fact of an ex parte communication concerning a pending matter, regardless of the content of the communication, is harmful to the integrity of the judicial process,[9] and "every unlawful ex parte communication on the merits is injurious to the integrity of the legal system and must be taken seriously." *Lopatin*, *supra* at 258. We therefore concur with the panel that respondent's conduct meets the criteria of ABA Standards 5.22 and 6.32 for which suspension is the presumptive level of discipline.

With regard to the aggravating and mitigating factors, we note that of the many aggravating factors cited by the Administrator,[10] the panel found that only one applied; 9.22(g) (refusal to acknowledge the wrongful nature of conduct), noting that "there is no evidence that respondent engaged in the offending conduct for an improper purpose. However it is clear that throughout these

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> is improper, and causes injury or potential injury to a party or causes interference or potential interference with the outcome of the legal proceeding.

[8] ABA Standard 5.23 states:

> Reprimand is generally appropriate when a lawyer in an official or governmental position negligently fails to follow proper procedures or rules, and causes injury or potential injury to a party or to the integrity of the legal process.

ABA Standard 6.33 states:

> Reprimand is generally appropriate when a lawyer is negligent in determining whether it is proper to engage in communication with an individual in the legal system, and causes injury or potential injury to a party or interference or potential interference with the outcome of a legal proceeding.

[9] However, the nature of the communication can have a bearing on the appropriate level of discipline. See *Grievance Administrator v Sheldon L. Miller*, 90-134-GA (ADB 1991).

[10] 9.22(b) (dishonest or selfish motive); 9.22(c) (pattern or misconduct); 9.22(d) (multiple offenses); 9.22(g) (refusal to acknowledge wrongful nature of conduct); and, 9.22(I) (substantial experience in the practice of law).

proceedings respondent has refused to acknowledge that the [ex parte text] messaging was inherently wrong." (Sanction Report, 10/31/19, p 8.) The panel further found that the mitigating factors found in ABA Standard 9.32(a) (absence of a prior disciplinary record) and 9.32(b) (absence of a dishonest or selfish motive), applied.

We find that the other aggravating factors cited by the Administrator are applicable and conclude that they should have been considered by the panel. Respondent engaged in a pattern of misconduct, 9.22(c), committing multiple offenses, 9.22(d), over the time period he exchanged text messages with Mr. Nassif, and he has substantial experience in the practice of law, 9.22(i). In addition, we find that respondent's actions arguably evidence a selfish motive, as referenced in 9.22(b) rather than an absence of a selfish motive, as referenced in 9.32(b), in remaining in Mr. Nassif's favor and continuing their friendship.

Finally, we undertake an analysis of certain important factors which may then be compared to other cases to aid us in determining the duration of the appropriate suspension to impose here.[11] Before the panel, respondent relied on *In re Filip*, 503 Mich 956 (2019); *Grievance Administrator v Paul E. Hamre*, 16-122-GA; and, *In re Haley*, 476 Mich 180 (2006) in support of his request for a reprimand. The hearing panel analyzed all three cases and distinguished them from the instant matter in their sanction report:

> Respondent cites to *In re Filip*, 503 Mich 956 (2019), where the Supreme Court entered an order, not an opinion, imposing a public censure to a judge who sent an assistant prosecutor case law relevant to matters being presented by the prosecutor to the judge. The Court approved a consent agreement in which the judge was to be censured. However, the Court did not provide extensive explanation for its decision nor did the Judicial Tenure Commission. (Justice Bernstein would have remanded the matter to the Commission for further explanation of its decision.) Hence, the case is not particularly relevant here.
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> Respondent also cites to *Grievance Administrator v Paul E. Hamre*, 16-122-GA, Respondent explains that a judge shared comments regarding an attorney with their opponent and may have discussed a case with defense counsel away from plaintiff's counsel. In *Hamre*, three attorneys were sanctioned with reprimands, and the sanction was stipulated. No analysis of the sanction was made as the panel accepted

[11] *Musilli*, *supra*.

> the parties' stipulated sanction.
>
> Respondent cites to *In re Haley*, 476 Mich 180, 195–96; 720 NW2d 246, 255 (2006), in which a judge accepted a gift of football game tickets from an attorney appearing in a pending matter. The Supreme Court adopted the recommendation of the Judicial Tenure Commission that the judge be publicly censured . . . The case is instructive but not for the reasons suggested by Respondent. In *Haley*, there was a single incident of misconduct, not hundreds ("an inappropriate lapse of ethical judgment"). In addition, the Supreme Court findings focused on the impact that the conduct had on the perception of the judicial system – exactly what concerns this panel. [Sanction Report 10/31/19, pp 4-5.]

Respondent relies on these same cases on review because "they are all cases where the judges' mental state was more than just negligent." (Respondent's Brief, p 24.) Respondent also cites to *Grievance Administrator v James D. O'Connell*, 97-172-GA (ADB 1999), in which Respondent O'Connell was reprimanded after he admitted that he participated in an ex parte contact with the presiding judge in which the merits of his client's pending criminal case were discussed. As with the above referenced cases, we note that the parties in *O'Connell* engaged in a single ex parte contact. Furthermore, testimony was presented that all of the judges in that particular court had ex parte discussions with prosecutors as well as defense counsel, the same being the standard of conduct at that court.

In addition to the Michigan cases cited by respondent, we add the following that arise from the judicial arena, further noting that all reference arguably more egregious conduct that either caused actual harm or had an actual effect on the outcome of the underlying proceedings: *Grievance Administrator v Susan R. Chrzanowski*, 01-56-GA (2002), (90-day suspension for respondent's plea of no contest to the allegations that, while she was a Judge of the 37th District Court, she assigned 56 criminal matters to an attorney she was romantically involved with, and knowingly failed to disclose to the parties her relationship with that attorney, in violation of MCR 9.104(1)-(4); 9.205(C)(4); MRPC 8.4(a) and (c); and Michigan Code of Judicial Conduct Canons 1, 2 and 3; the panel further found that respondent made a false statement to the police during their investigation of a homicide, in violation of MCR 9.104(3)); *Grievance Administrator v Hon. William Waterman*, 99-152-GA (2000) (60-day suspension, by consent. While a judge, respondent leased office space to various attorneys who regularly appeared before him and to whom he gave numerous assignments

without disqualifying himself from those matter or disclosing his financial relationship when they appeared before him, and in a land forfeiture action, respondent intentionally granted relief favoring one party based on an *ex parte* request); *In re Hon. R. Darryl Mazur,* 498 Mich 923 (2015) (public censure and 30-day suspension without pay, by consent, for asking female defendant in a domestic relations matter, after respondent placed her on probation, whether she was "interested in seeing [him]?"and continuing to exchange email messages with her for approximately a year); and, *In re Hon. Elizabeth Biolette Church,* 499 Mich 936 (2016) (public censure and 120-day suspension without pay, by consent, for engaging in substantive *ex parte* communications relevant to the merits of pending proceedings and thereafter reducing and/or dismissing charges outright, modifying sentences, and dismissing ticket cases without holding a hearing or with explicit authority from the prosecutor to do so.) Again, none of these cases imposed suspensions of the length imposed by the panel here.

Respondent also references two North Carolina judicial disciplinary cases in support of his request for a reprimand or short suspension: *In re Allen*, 362 NC 73; 653 SE2d 423 (2007) (public censure, by consent, for engaging in conduct inappropriate to his judicial office in legal proceedings involving a former client of respondent's, and with whom respondent maintained both a "father-like" and business relationship); and *Public Reprimand of B. Carlton Terry, Jr.*, North Carolina Judicial Standards Commission Inquiry No. 08-234 (2009), (public reprimand for engaging in ex parte communications with counsel for a party in a matter being tried before him and being influenced by information he independently gathered by viewing a party's web site while the party's hearing was ongoing, even though the contents of the web site were never offered as nor entered into evidence during the hearing.)

More recent decisions from other jurisdictions include *Disciplinary Proceedings Against Piontek*, 927 N.W.2d 552 (Wis. 2019), (five day suspension without pay for judge who initiated an ex parte communication with a prosecutor about plea negotiations in one case and used the internet to independently investigate a defendant prior to sentencing in a second case); *In re Complaints Against Dist. Judge Colin S. Bruce*, Nos. 07-18-90053, 07-18-90067 (7th Cir. Jud. Council May 14, 2019), (admonishment of judge for his former practice of engaging in ex parte communications with the U.S. Attorney's Office in the Central District of Illinois, where the judge worked for twenty-four years before being appointed to the District Court. Noting that no evidence was submitted to suggest

that the judge's ex parte contact or relationship with the U.S. Attorney's Office impacted his decision making in any case, the Council concluded that a more serious reprimand was unnecessary); and, *Disciplinary Counsel v Porizo*, 153 N.E.3d 70 (Ohio 2020), (six month suspension conditionally stayed until completion of a continuing legal education course on judicial ethics and bias for a magistrate's conduct in engaging in ex parte communication with a party, after the opposing party had been excused from the courtroom, which included the magistrate's views of the case and legal concepts, and comments regarding opposing party's integrity that gave the appearance of bias against opposing party.)

While we agree with the panel that a suspension of respondent's license is warranted, as the above-referenced cases demonstrate, lengthy suspensions appear to be rarely imposed, even when the conduct has an actual effect on the outcome of the proceedings. Importantly, the panel here was "uncertain whether respondent's judgment was affected [by his friendship with Mr. Nassif],[12] and they eventually found that "the record does not show respondent ever adjusted a decision or made a ruling based on his friendship with [Mr. Nassif.] All of the available evidence suggests that respondent made rulings based on his understanding of the facts and the law."[13]

As we have previously noted, the task of imposing disciplinary sanctions involves a careful weighing of the pertinent factors in light of the unique circumstances of each case. *Grievance Administrator v Deutch*, 455 Mich 149, 163; 565 NW2d 369 (1997). And, this remains true even after the Standards were adopted to promote consistency in discipline through the application of the Standards' analyses and rubrics. *McCree*, supra at 10. In *Lopatin,* the Court adopted the Standards to foster consistency in discipline so that seemingly identical cases would not receive vastly different levels of discipline, and it reaffirmed that the Board and its panels must consider meaningful distinctions between instances of lawyer conduct and gauge and adjust discipline appropriately based on such distinctions. "The ABA Standards will guide hearing panels and the ADB in imposing a level of discipline that takes into account the unique circumstances of the individual case, but still falls within broad constraints designed to ensure consistency." *Id.* at 245-246.

It is apparent from the panel's reports that they considered this matter with care and deliberated quite thoughtfully about the appropriate sanction, justifying the imposition of a one year suspension

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[12] Misconduct Report 4/25/19, p 13.

[13] Sanction Report 10/31/19, p 8.

because that duration would "reinforce the commitment of the Bar to the judicial process and will underscore that the judicial system must be free of even the perception of bias or partiality." (Sanction Report 10/31/19, p 10.) Like the panel, we condemn respondent's conduct and agree that a suspension is warranted. However, given the panel's specific findings that respondent did not adjust a decision or base a ruling on his friendship with Mr. Nassif, we conclude that modification of the hearing panel's order of suspension is warranted. Thus, we reduce the suspension of respondent's license to practice law in Michigan from one year to 180 days.

IV. Additional Issues Raised on Review.

A. Attorney Discipline for the Conduct of Former Judges.

On review, respondent contends that it was improper for the panel to "punish" him as an attorney for conduct that is considered to be judicial misconduct. Respondent argues that the panel's findings that respondent's conduct "harmed the appearance of impartiality of the judicial system," and that "[t]his isn't conduct for which an attorney should be disciplined" because the Michigan Rules of Professional Conduct, unlike the Code of Judicial Conduct, do not prohibit conduct giving rise to an appearance of impropriety.

At the misconduct hearings below, upon the conclusion of the Administrator's case in chief, respondent moved for the involuntary dismissal of the formal complaint, arguing in part, that the panel lacked jurisdiction to consider the formal complaint because the conduct set forth in the complaint related exclusively to his conduct while acting as a sitting judge. (Tr 4/19/18, pp 237-242; Tr 4/20/18, pp 253-268.)

Relying on precedent, which included references to our decisions in *Grievance Administrator v Wade H. McCree*, 14-59-GA (ADB 2017) and *Grievance Administrator v Andrea J. Ferrara*, 98-184-GA (ADB 2000), the panel rejected respondent's contention that it lacked the authority to consider judicial misconduct as a basis for disciplinary action against an attorney:

> The panel concludes that it has jurisdiction over the facts alleged in the formal complaint even though they relate to respondent's performance as a judge. This conclusion is compelled by the text of the Rules of Professional Conduct, prior decisions of the Attorney Discipline Board and common sense. [Misconduct Report, 4/25/19, p 11.]

We agree with the panel's assessment of its authority in this regard and concur with the panel that "it is axiomatic that an attorney serving as a judge should not be able to avoid the consequences

of his or her misconduct by resigning their office. That would permit a person to escape sanction for the most egregious of behavior, a result which belies common sense. Given clear authority from the Board, the panel concludes that it has jurisdiction with respect to the formal complaint."[14] (Misconduct Report 4/25/19, p 12.) The panel's analysis at pages 11-12 of its misconduct report is persuasive and more than adequately disposes of this argument.

This Board has previously found that an abuse of judicial authority, for example, may give rise to a determination that there has been attorney misconduct. *Ferrara*, *Id*., citing *Grievance Administrator v Richard M. Maher*, 92-225-GA (ADB 1996) (case involving former judge in which the exception for gifts constituting "ordinary social hospitality," Canon 5C(4)(b), Code of Judicial Conduct, was analyzed). See also, *Grievance Administrator v Dennis P. Mikko*, 13-80-GA (HP Report, dated 6/6/2014) (proceeding under MCR 9.116 against former magistrate in which panel found, among other things, violation of Canon 2A, Code of Judicial Conduct [appearance of impropriety]). Furthermore, as the comments to MRPC 8.4 indicate, "Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of attorney."

We conclude that the panel clearly had the authority to hear this matter under MCR 9.116, and to consider whether respondent's conduct as a judicial officer constituted one or more violations of MCR 9.104, and the professional standards and rules referenced therein. We further conclude that the panel did not err in deciding that attorney discipline is appropriate.

B. The Panel's Decision not to Consider the Stipulation Pursuant to MCR 9.115(F)(5).

Finally, we address respondent's argument that the hearing panel's September 7, 2018 Order Denying Stipulation for Consent Discipline and Scheduling Briefs was erroneously entered, and that the panel's [other order not sending to another panel] amounted to a denial of due process. Respondent's arguments rely, primarily, on a repeated and incorrect characterization of the hearing panel's order, i.e., that the panel "rejected" the parties' stipulation for consent order of discipline, as that term is used in MCR 9.115(F)(5)(c)(ii), (d), and (e). In fact, the panel denied the stipulation as untimely.

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[14] Pursuant to MCR 9.116(B), the Administrator or Commission may take action against a former judge for conduct resulting in removal as a judge, *and for conduct which was not the subject of a disposition by the Judicial Tenure Commission or by the Court*. (Emphasis added.) Respondent voluntarily resigned from the bench in 2015 before the underlying conduct in this matter could become the subject of a disposition by the JTC or by the Court.

In response to the hearing panel's order requiring the parties to either simultaneously file their respective briefs or "to submit an alternative resolution to the panel," the parties filed a pleading titled "Stipulation for Consent Discipline" specifically indicating that the stipulation was filed pursuant to MCR 9.115(F)(5). The hearing panel *declined to consider the stipulation* under MCR 9.115(F)(5) for the following reasons:

> As we read the rule, after a hearing has commenced, the parties are free to stipulate to facts and they may jointly recommend an appropriate sanction when the case has reached the sanctions stage. However, where, as here, the record is closed, it is the panel's responsibility to decide whether misconduct has occurred as set forth in the formal complaint. MCR 9.115(J). If misconduct is found, the parties may discuss the appropriate sanction and make separate or joint presentations, orally or in writing, as to the appropriate sanction and the panel will render its decision in accordance with MCR 9.115(J). The prehearing procedures for considering a stipulation pursuant to MCR 9.115(F)(5), including the procedure outlined in MCR 9.115(F)(5)(c) for approval of, or communication of concerns with, a stipulation do not apply at this stage. [Hearing Panel Order dated 9/7/18.]

Respondent argues that, contrary to MCR 1.106,[15] the panel relied too heavily on the heading of the subrule which specifically indicates it is a "prehearing procedure," and that other panels have considered consent stipulations under MCR 9.115(F)(5) once hearings have begun or proceeded even further than was the case here. As to the latter argument, we note that such incidents are, of course, not precedential. Moreover, other panels have taken the opposite approach.[16]

We do not conclude that the panel erred in its decision to move forward with written closing arguments and findings of misconduct after the close of proofs rather than engaging in the process

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[15] MCR 1.106 states: "The catch lines of a rule are not part of the rule and may not be used to construe the rule more broadly or more narrowly than the text indicates."

[16] In *Grievance Administrator v Gregory Jones*, 10-57-GA, for example, the panel issued its report on misconduct and scheduled a sanction hearing. The parties subsequently stipulated to adjourn the sanction hearing and submitted a stipulation for consent order of discipline under MCR 9.115(F)(5). The panel opined that the procedure was not available to the parties at that point in the proceedings, ruled that the sanction hearing would continue, and, like the panel here, that it would consider the parties' stipulation as to discipline as a joint sanction recommendation. Such a stipulated resolution was also filed in *Grievance Administrator v Paula Thornton*, 05-112-GA. In that matter, the parties filed a pleading titled "stipulation as to level of discipline" after the misconduct hearing concluded and without any reference to MCR 9.115(F)(5). The parties' stipulation noted the hearing panel's findings of misconduct after hearing, and set forth their agreed upon discipline and the reasoning behind it.

set forth in MCR 9.115(F)(5). The panel offered the parties a reasonable process for narrowing disputes and submitted a proposed resolution, just not the (F)(5) process. This was wise and proper, and was not made, we believe, simply because of the catchline.

Principles of statutory construction apply when construing court rules. *Anonymous v AGC*, 430 Mich 241, 250 n 5; 422 NW2d 648 (1987). An important rule of construction is that:

> "statutory provisions are *not* to be read in isolation; rather, context matters, and thus statutory provisions are to be read as a whole." An attempt to segregate any portion or exclude any portion of a statue from consideration is almost certain to distort legislative intent. [*Speicher v Columbia Twp Bd of Trustees*, 497 Mich 125, 137-138; 860 NW2d 51 (2014); emphasis in original; footnotes omitted.]

The structure of MCR 9.115 alone places the specific consent procedure in subparagraph (F)(5) in a particular context and order. The rule deals with "Hearing Panel Procedure" and proceeds to cover, in order, complaints, service, answers, and prehearing procedures (including extensions, disqualification, amendment of pleadings, discovery, and a specific process for consent discipline). Next, MCR 9.115 deals with hearing, decision, and stay pending review by the Board. Yes, there are catchlines accompanying the body of text for these subrules, but that does not conflict with or alter the text and the structure of the overall rule. This structure and order is logical and serves to avoid the waste of adjudicative resources and panel-shopping once the hearing has commenced. Other rules, too, support this construction. For example, MCR 9.128(1) provides that "Basic Administrative Costs" shall be imposed in an order of discipline as follows: "(a) for discipline by consent *pursuant to MCR 9.115(F)(5),* $750; (b) for all other orders imposing discipline, $1,500" (emphasis added). Plainly, this presumes that significantly fewer resources will be expended in MCR 9.115(F)(5) consent cases.

Also, these proceedings are to be "as expeditious as possible." MCR 9.102(A). The provisions of MCR 9.115(F)(5) are designed to apprise a panel early of the nature of the case and which allegations are contested or admitted, providing information about the case sufficient for the panel to ascertain the nature of the misconduct before assessing the appropriate sanction. Here, the panel had completed the misconduct hearing, framed by the pleadings, and had, therefore, received all of the evidence and closed the record. To require the panel to back up, review only the papers envisioned by MCR 9.115(F)(5), and go through *those* procedures instead of the approach suggested by the panel, makes little sense. It also invites the possibility that the parties would not like the

panel's view of the case and could, essentially, reject this panel's rejection, rendering the time spent by this panel a waste, while the case would go to a new panel for another trial. This would seem to be somewhat less than efficient.

Respondent also argues that *the panel* erred in not assigning the case to a new hearing panel under MCR 9.115(F)(5)(e) and that this caused a violation of his due process rights because it is likely that the panel's review of the stipulation impacted their eventual decision. Again, the hearing panel here did not "reject" the parties' stipulation. Rather, the panel's order "denied" the stipulation, declining to consider it as untimely. In fact, in order for MCR 9.115(F)(5)(e) (requiring reassignment to a new panel) to apply, several steps would have had to have occurred. Specifically, the panel would have had to consider the stipulation and either approve or communicate with the parties about concerns with it, have a status conference or similar proceeding before rejecting, then issue a rejection with reasons, and, finally, entertain a new stipulation. None of that happened.

Moreover, the panel plays no role in reassignment following rejection (assuming it had occurred). The Board would reassign a case, and here, the then-Board Chairperson, Michael Murray decided the respondent's Motion for Reassignment to a New Hearing Panel, treating it as a motion to disqualify the panel. (Order Denying Respondent's Motion For Assignment to a New Hearing Panel, dated December 18, 2018.) Chairperson Murray specifically found no grounds for disqualification under MCR 2.003(C) and that the panel's continued participation would not present a serious risk of actual bias thereby violating respondent's due process rights.

The Administrator argues that because these proceedings are governed by the practice and procedures applicable in a bench trial, MCR 9.115(A), the hearing panel's findings are "presumed to be the result of a correct application of the law to the evidence presented," citing *People v Beard*, 171 Mich App 538, 544; 431 NW2d 232 (1988). We agree, and note that this panel was clearly well aware that a stipulation for consent order of discipline, whether rejected or not considered, is inadmissible in disciplinary proceedings against a respondent and is not binding on either party. Cf., MCR 9.115(J)(5)(e)(ii). As the Administrator points out, the panel made its own findings based on the record, which varied greatly from the parties' stipulated facts. Furthermore, the notion that a hearing panel needs to be protected from inadmissible evidence or replaced, as would a jury, has been rejected repeatedly by this Board. See *Reed*, *supra*:

> Hearing panels, like judges in bench trials, regularly hear arguments about admissibility of evidence, and then appropriately proceed to hear

> the case, disregarding that which is inadmissible. We presume that the hearing panels are more than capable of performing this important function.
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> As this Board has said in *Grievance Administrator v Richard Austin*, 99-12-GA (ADB 2001): "This Board and the hearing panels are not juries. We can, and indeed often must, look at potentially inadmissible evidence in order to evaluate the evidentiary rulings of a panel." See also, *People v Jones*, 168 Mich App 191, 194; 423 NW2d 614 (1988), Iv den 431 Mich 873 (1988). ("A judge, unlike a juror, possesses an understanding of the law which allows him to ignore such errors and to decide a case based solely on the evidence properly admitted at trial.") And see, the Board Chairperson's opinion in *Grievance Administrator v H Wallace Parker*, 95-30-GA (ADB 1995) (denying disqualification sought "solely on the grounds that the panel members, during the course of the proceeding, have been exposed to information which may be inadmissible under the Michigan Rules of Evidence"). [*Grievance Administrator v Peter W Macuga, II*, 12-52-GA (ADB 2012).]

Finally, this Board has rejected an Ohio attorney's claim in reciprocal discipline proceedings here that she was denied due process in Ohio "because the hearing in that jurisdiction was conducted before the same panel which originally rejected the parties' proposal for a public censure." *Grievance Administrator v Linda S. Cook*, 03-10-RD (ADB 2004), p 6.

V. Conclusion.

We find proper evidentiary support for the hearing panel's findings that respondent engaged in impermissible ex parte communications with Mr. Nassif and that he had a duty to disclose the extent of his friendship with Mr. Nassif, or to recuse himself from Mr. Nassif's matters. We therefore affirm the panel's finding that respondent violated Canons 2A, 2 B, and 3A(4)(a); MRPC 8.4(c); and, MCR 9.104(1), (2), and (4), as set forth in Count One. The panel's finding that this same conduct violated MCR 9.104(3); MRPC 3.5(b), and that the conduct set forth in paragraphs 40-42 of the formal complaint constitutes misconduct, is not properly supported and we reverse the panel's findings in that regard.

With regard to Count Two, we find that the panel's conclusions that respondent did not violate Canons 2 and 3, and did violate Canons 2C and 3B; MRPC 3.5(b), 8.3, 8.4(b); and, MCR 9.104(3), are not fully supported by the evidentiary record presented and we reverse those findings. Instead, we conclude that the evidence supports a finding that respondent violated Canon 2A, B, and C;

MRPC 8.4(a) and (c); and MCR 9.104(1) and (4), as set forth in Count Two.

With regard to Count Three, again we conclude that the evidence supports a finding that respondent violated Canon 2A; MRPC 8.4(c); and MCR 9.104(1) and (4), and we affirm the panel's finding that respondent violated MCR 9.104(2).

We agree with the panel that a suspension, rather than a reprimand, will serve the purpose of protecting the public's confidence in the judiciary and the legal profession and will hopefully serve to deter others from engaging in similar conduct. However, given that respondent did not adjust a decision or base a ruling on his friendship with Mr. Nassif, we reduce the suspension imposed by the hearing panel from one year to 180 days.

The panel had the authority to hear this matter under MCR 9.116, to consider whether respondent's conduct as a judicial officer constituted one or more violations of MCR 9.104, and the professional standards and rules referenced therein, and to decide whether attorney discipline was appropriate. Finally, the panel's unwillingness to accept a stipulation for consent order of discipline, specifically filed under MCR 9.115(J)(5), after the panel conducted two full days of hearing on whether misconduct was established, did not compromise respondent's due process rights or the panel's ability to remain fair and impartial.

Board members Michael B. Rizik, Jr., Barbara Williams Forney, Karen D. O'Donoghue, Linda S. Hotchkiss, MD, Michael S. Hohauser, and Peter A. Smit concur in this decision.

Board member James A. Fink did not participate in this decision.

Board members Jonathan E. Lauderbach, and John W. Inhulsen were absent and did not participate in this decision.