STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellee/Cross-Appellant,

v

Gregory J. Reed, P 24750,

Respondent/Appellant/Cross-Appellee,

Case No. 10-140-GA

Decided: September 16, 2014

Appearances:

Todd A. McConaghy, for the Grievance Administrator, Petitioner/Appellant/Cross-Appellee
Lynn H. Shecter, for Respondent/Appellant/Cross-Appellee, Oral Argument only
Ernest L. Jarrett, for Respondent/Appellant/Cross-Appellee, Briefs only

BOARD OPINION

Tri-County Hearing Panel #80 issued an order of discipline in this matter on June 6, 2013, suspending respondent's license to practice law in Michigan for 90 days, with the condition that respondent attend 15 hours of Continuing Legal Education (CLE) in pre-trial procedure, with at least half of the CLE hours to include civil pre-trial procedure. The panel found that respondent unreasonably advocated that personal jurisdiction over a defendant was proper in the State of Michigan; filed vexatious or frivolous pleadings in one matter; filed a frivolous lawsuit in a related matter; and failed to report an attorney's known professional misconduct to the Attorney Grievance Commission. Respondent filed a petition for review and the Grievance Administrator filed a cross-petition. The Attorney Discipline Board has conducted review proceedings in accordance with MCR 9.118 and, for the reasons discussed below, we affirm the hearing panel's sanction and findings of misconduct, except for the finding that respondent violated MRPC 8.3(a).

I. Factual Background.

According to the complaint filed in the United States Court for the Eastern District of Michigan filed by respondent Reed (and two other attorneys, Stephanie Hammond and Francois Nabwangu), Cheryl Janky is an artist and songwriter transacting business in Detroit and other cities in the US and the author of a song called "Wonders of Indiana," sometimes called "Indiana."

The hearing panel's report on misconduct summarizes the history of this case:

> This matter commenced on December 28, 2010, when the Grievance Administrator filed a formal complaint against Stephanie L. Hammonds, Case #10-138-GA; Francois M. Nabwangu, Case #10-139-GA; and Gregory J. Reed, Case #10-140-GA. The complaint alleged misconduct premised upon respondent's, Hammonds' and Nabwangu's representation of Cheryl Janky in three legal actions filed against the Lake County Convention & Visitors Bureau (LCCVB) and other defendants that were all related to Janky's claim of copyright infringement of a song she wrote. The three actions are referred to in this report as [*"Janky I"*], [*"Janky II"*], and [*"Janky III"*]. Respondent filed *Janky I* on behalf of his client in the United States District Court for the Eastern District of Michigan in October 2003. The court transferred that action to the United States District Court for the Northern District of Indiana early in March 2005. Respondent, with Indiana counsel, filed *Janky II* on September 7, 2006, in the Lake County (Indiana) Circuit Court against LCCVB and other defendants. Reed, Hammonds and Nabwangu filed *Janky III* against LCCVB and other defendants, including legal counsel for LCCVB in *Janky I*, on September 28, 2007.
>
> The Grievance Administrator's five-count formal complaint alleged misconduct in the manner in which the respondents conducted the Janky cases, the unlawful practice of law in Indiana and the failure of each respondent to report to the Attorney Grievance Commission (AGC) the misconduct of the other respondents. The Grievance Administrator supported his complaint with a book of 27 tabbed exhibits. Those exhibits included many pleadings, papers and opinions and orders from the three *Janky* actions. [Report on misconduct, p 2.]

The proceedings prior to the commencement of the hearing before the panel included numerous motions by respondents for summary disposition,[1] disqualification of the panel,

---

[1] The motion of respondents Reed and Hammonds for summary disposition under MCR 2.116(C)(8) and (C)(10) was granted in part. Allegations of misconduct for failure to communicate settlement offers to Janky were dismissed; the panel relied on a judicial finding that Hammonds and Reed had conveyed settlement offers to Janky. (Petitioner's Exhibit 18, pp 80-81.)

disqualification of counsel for the AGC, a renewed motion to disqualify the panel, petitions for interlocutory review, the stipulation to consent discipline by co-respondents Hammonds and Nabwangu, and pretrial conferences.

Hearings were held on October 25-26, 2011. After confirming multiple times that Petitioner's Exhibits 1-27 were admitted and that it would not be necessary to call judges or other court personnel, the Grievance Administrator's counsel called only respondent as a witness and rested after the panel issued an order on February 24, 2012, admitting Petitioner's Exhibits 1-27 and allowing respondent to introduce any rebuttal evidence thereto. Respondent's counsel called only respondent, Cheryl Janky, and local counsel, Thomas Lewis. Additional hearings were held on May 8, 2012; May 10, 2012; and June 7, 2012. Closing arguments were submitted in briefs.

II. The Panel's Reports.

A. Report on Misconduct.

In its January 3, 2013 report on misconduct, the panel made the following findings with respect to the Grievance Administrator's allegations of misconduct as set forth in the Grievance Administrator's July 9, 2012 written closing argument. The Grievance Administrator alleged that respondent violated MRPC 1.2(a); 1.3; 3.1; 3.2; 5.5(a); 8.3(a); 8.4(a)-(c); and MCR 9.104(A)(1)-(4).

The panel found that respondent violated MRPC 1.2(a); 3.1; 3.2; 8.3(a); 8.4(a) and (c); and MCR 9.104(A)(1), (2), and (4) by:

1. unreasonably advocating that personal jurisdiction of Lake County Convention & Visitors Bureau was appropriate in the State of Michigan in *Cheryl Janky v Henry Farag, Street Gold Records, and Lake County Convention and Visitors Bureau*, United States District Court for the Northern District of Indiana Hammond Division, Case No. 3:05-CV-00217 ("Janky I");

2. filing vexatious or frivolous pleadings in the above matter;

3. failing to report the misconduct of Attorney Francois M. Nabwangu, despite knowing that Attorney Nabwangu had committed a significant violation of the Rules of Professional Conduct; and,

4. filing a frivolous lawsuit brought for the improper purpose of harassing the defendants and needlessly increasing the cost of litigation in *Cheryl Janky v Speros Batistatos, Lake County*

> *Convention & Visitors Bureau and its Board of Directors*, United States District Court for the Northern District of Indiana Hammond Division, Case No. 2:07-CV-00339 ("Janky III").

The panel specifically did not find that respondent violated MRPC 1.3 (lack of diligence); 5.5(a) (unauthorized practice of law); or, 8.4(b) and MCR 9.104(A)(3) (dishonest conduct).

B. Report on Sanctions.

In its sanction report, the panel noted that, when applying the American Bar Association (ABA) Standards for Imposing Lawyer Sanctions (Standards), as directed in *Grievance Administrator v Lopatin*, 462 Mich 235, 238 (2000), respondent violated his ethical duty to his client, the public, and the legal system; that his misconduct was done knowingly; and that there was actual injury to his client on multiple occasions. The panel also found that respondent's conduct warranted a suspension under Standard 6.22 (Abuse of the Legal Process) and Standard 7.2 (Violations of Duties Owed as a Professional). In determining the appropriate length of suspension, the panel found that the mitigating factors identified by respondent under ABA Standard 9.32,[2] did not outweigh the aggravating factors,[3] and, because of the number and the nature of the aggravating factors present in this case, the panel determined that respondent should be suspended for 90 days. The panel also determined that respondent should attend 15 hours of Continuing Legal Education (CLE) in pre-trial procedure.

III. Arguments on Review.

A. Admission of Grievance Administrator's Exhibits and Reliance On Findings Therein as Prima Facie Evidence of Misconduct.

Respondent does not dispute the fact that he was sanctioned, and, he has not actually argued that the Grievance Administrator's Exhibits 1-27 were inadmissible. Instead, he first argues that his stipulation to their admissibility was actually not such; it was, he argues, ambiguous and, at most,

---

[2] Standard 9.32(a) (absence of a prior disciplinary record), Standard 9.32(d) (timely good faith effort to rectify consequences of misconduct - respondent made timely rectification by paying his sanctions), and, Standard 9.32(k) (the imposition of other penalties or sanctions - the court has sanctioned respondent).

[3] Standard 9.22(b) (dishonest or selfish motive - respondent's conduct was done to gain an advantage in the litigation), Standard 9.22(c) (pattern of misconduct - as noted, respondent's conduct spanned three different legal actions over a period of several years); Standard 9.22(d) (multiple offenses - the panel found multiple offenses to have occurred in multiple cases before multiple judges), Standard 9.22(g) (refusal to acknowledge wrongful nature of conduct - respondent accepted zero responsibility despite multiple sanctions by the federal court and continued to insist that all wrongdoing was due to others and not himself), and, Standard 9.22(i) (substantial experience of law - respondent has been practicing for 38 years).

a stipulation to authenticity of the documents. Second, respondent argues that even if the court orders and documents are admissible, MCL 600.2106 does not apply to these court orders and opinions and that, therefore, no presumption should arise with respect to the truth of the contents of these court documents.[4] Finally, respondent argues that it wasn't proven that he was afforded due process in Indiana.

We can dispose of the last argument in short order. Respondent analogizes this proceeding to a reciprocal discipline case,[5] and argues that portions of that rule should be deemed applicable here and apparently contends that the opinions and orders at issue should not have been admitted or afforded any weight because the Administrator did not establish that respondent's due process rights were violated in the Indiana federal courts. These civil sanction orders do not impose attorney discipline under rules of professional conduct. Further, MCR 9.120(C) does not apply here; this case was not commenced under that rule. Finally, respondent shifts the burden impermissibly. Were this a reciprocal discipline matter, it would be the respondent's burden to establish denial of due process in the original jurisdiction. No such showing has been attempted here.

1. Standard of Review.

Error may not be predicated upon a ruling admitting evidence unless a timely objection or motion to strike appears of record, stating the specific ground of the objection. MRE 103(a)(1). A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Burns*, 494 Mich 104, 110; 832 NW2d 738 (2013). The application of this standard has been discussed by our appellate courts:

> A trial court's decision whether to admit or exclude evidence will not be disturbed on appeal absent an abuse of discretion. *Elezovic v Ford Motor Co*, 472 Mich 408, 419; 697 NW2d 851 (2005). The trial court abuses its discretion if its decision is outside the range of principled outcomes. *People v Orr*, 275 Mich App 587, 588-589; 739 NW2d 385 (2007). "A decision on a close evidentiary question ordinarily cannot be an abuse of discretion." *Lewis v LeGrow*, 258 Mich App

---

[4] That statute provides that an authenticated "copy of any order, judgment or decree, of any court of record in this state . . . shall be prima facie evidence of . . . all facts recited therein." The Board held that MCL 600.2106 applied to discipline proceedings in *Grievance Administrator v Geoffrey N. Fieger*, 97-83-GA (ADB 1999).

[5] He cites former MCR 9.104(B), which, like the current rule – MCR 9.120(C) – provides that an adjudication of attorney misconduct in another jurisdiction is conclusive proof of attorney misconduct in a Michigan discipline proceeding unless due process was not afforded to respondent in the original jurisdiction.

> 175, 200, 214; 670 NW2d 675 (2003). Moreover, even if a court abuses its discretion in admitting or excluding evidence, the error will not merit reversal unless a substantial right of a party is affected, MRE 103(a), and it affirmatively appears that the failure to grant relief is inconsistent with substantial justice, MCR 2.613(A). See *Chastain v General Motors Corp*, 467 Mich 888, 654 NW2d 326 (2002); *Lewis, supra* at 200. [*Morales v State Farm Mut Auto Ins Co*, 279 Mich App 720, 729; 761 NW2d 454 (2008), lv den 483 Mich 877 (2009).]

To those standards and harmless error rules, we must add MCR 9.107(A), which provides that a proceeding under Subchapter 9.100 "may not be held invalid because of a nonprejudicial irregularity or an error not resulting in a miscarriage of justice."

2. Panel Proceedings Regarding Submission of Exhibits.

As noted, respondent first contends that he did not stipulate to the admission of the 27 exhibits proffered by the Administrator. Both parties quote from the colloquies in the transcript about the admission of these exhibits. Respondent argues that he only intended to stipulate to the authenticity of the documents. This was not borne out by the record, as the panel correctly found.

At the May 23, 2011 pretrial, the panel chair inquired of the parties how many witnesses would be testifying. When counsel for the Administrator spoke to this question he stated as follows:

> MR. McCONAGHY: Just as housekeeping, I can narrow this down dramatically, my witness list. In fact, I can narrow it down I believe to the three respondents. But one matter I'd just like -- that comes to my mind as we're talking about this so that I know that, is, and this may seem redundant, but the book of exhibits we attached to the formal complaint, every party has stated that they intend to rely on these exhibits. Every party has stated that they're okay with the exhibits. They're certified court records. As long as this can be, this can come in, I can try this case based on the three respondents. Now, if this does not come in, I need to wrangle numerous judges and et cetera. I can speak to the issue of why this is admissible if you'd like me to, but I don't know if I need to. Everybody has already indicated they intend to rely on these. [Tr 05/23/11, p 57.]

A colloquy followed, and the subject was returned to when the Administrator's counsel stated: "Could I just clarify as long use [sic] we're okay with the exhibit book, though, as is right now?" Respondent replied on the record: "I think that's been stipulated. That's been stipulated." Tr 05/23/11, p 60.

At the October 25, 2011 hearing, near the end of his opening statement, counsel for the Administrator sought to confirm that "the exhibit book is admitted before we proceed with Mr. Reed's testimony."[6] Respondent's counsel argued to the panel that "there's nothing more than a stipulation as to authenticity of these documents but not their admissibility."[7] The Administrator's counsel, Mr. McConaghy, disagreed and read from the May 23rd transcript, as did the panel in ruling that "Mr. Reed and his counsel can argue the weight of the documents, but there was clearly a stipulation that those documents were admitted."[8] The examination of respondent in the Administrator's case-in-chief then commenced and the exhibits were the subject of questioning throughout the hearing.

The next day, October 26, 2011, the Administrator's examination of respondent continued with Mr. McConaghy questioning respondent about the orders of the Indiana federal court and objections by respondent's counsel raising the intertwined issues of the admissibility and effect of those orders in the disciplinary proceeding.[9] A fair amount of the substance of the federal sanctions orders came in through the testimony of respondent. For example, this question and answer show how some facts were established:

> Q. Well, what I want to know, and I guess I can ask it in a broader question, the three motions we just discussed, do they all contain the same allegations of -- there are really four points here. One, that there were some ex parte communications; two, that Ms. Janky was either under duress or very upset by the settlement negotiations; three, that Judge Cherry told you that you were one of the reasons the case has not settled; and, four, that there had been some racial remarks that Judge Cherry didn't address. Are those four points common to those three motions?
>
> A. Yes. [Tr 10/26/11, pp 67-68.]

However, at other times, respondent's counsel would object that he didn't have the particular judge there to cross examine about the contents of the order. After awhile, the panel chairperson sought to put this to rest:

---

[6] Tr 10/25/2013, p 64.

[7] Tr 10/25/2013, p 67.

[8] Tr 10/25/2013, pp 68-70.

[9] Tr 10/26/2013, pp 40, 44-50.

> CHAIRPERSON MANTESE: Counsel, let me ask you this, your case is pretty much premised on your exhibit book, you're not going to call Magistrate Cherry or Judge -- the judge in Indiana, am I correct?
>
> MR. McCONAGHY: Well, correct. And I have to state why, if you'll allow me. We were prepared to call every judge, we were prepared to call records custodians. As you know, this was brought to our attention by the U.S. District Court in Indiana, so their cooperation was implicit in bringing this to our attention. We honestly believed it would expedite matters, rather than try this case and call each judge to explain what the order was, to attach the orders to the complaint in the way we did. So, no, we are not going to call them. And I only ask questions of these records -- of the witness based on these records to get his recollection, get his impressions, and whether or not he wants to contradict something that's in the order. [Tr 10/26/11, pp 73-74.]

The hearing continued and the panel retired to deliberate about the admissibility of the exhibits and the effect of MCL 600.2106 and *Grievance Administrator v Geoffrey N. Fieger*, 97-83-GA (ADB 1999). Upon returning, the panel asked the parties to brief the questions, and also directed the parties to discuss the admissibility of the court documents in light of the rules against hearsay, including MRE 803 (24) and 804.

The Administrator's brief argued that the respondent's stipulation to the admission of the exhibits was unambiguous, relied upon, and should therefore be enforced. As for the applicability of *Fieger* and MCL 600.2106, the Administrator cited a panel decision in *Grievance Administrator v Mark L. Silverman*, 11-3-GA (HP order, 4/13/2011). Respondent's brief argued the same grounds advanced on review – that there was not a stipulation, that the statute and *Fieger* should not apply, and that the reciprocal discipline rule (or analogy thereto) required the petitioner to show that due process was afforded in the Indiana courts. The Administrator responded concisely and added an additional point: respondent's 2/21/2011 response to the Grievance Administrator's discovery demand states that "Respondent proposes to introduce the following documentary evidence at hearing: . . . All of Petitioner's exhibits to the Formal Complaint."

The panel issued an order stating its ruling: (1) "that petitioner's exhibits are ADMITTED for all purposes, including for their truth, pursuant to the parties' stipulation," and (2) "that respondent retains the right to introduce any and all rebuttal evidence thereto." (Hearing Panel Order, February 24, 2012.)

Ultimately, we find that this case can be decided upon the finding by the panel that respondent did in fact stipulate to the admissibility of petitioner's exhibits 1-27.

3. Evidentiary Weight of Federal Court Orders.

The second facet in respondent's argument concerns what a hearing panel may do with an order sanctioning respondent under Rule 11 or Rule 37 properly admitted through stipulation (or some other basis) if the statute does not apply. Is the statute necessary for these documents to have evidentiary weight, i.e., to be considered prima facie evidence of the facts recited? We do not think so. Prima facie evidence is simply "[e]vidence that will establish a fact or sustain a judgment unless contradictory evidence is produced." *DeCosta v Gossage*, 486 Mich 116 , 133; 782 NW2d 734 (2010). A certified order imposing sanctions is certainly probative of the fact that a lawyer was sanctioned under a rule proscribing frivolous or other such conduct. Compare *Waknin v Chamberlain*, 467 Mich 329, 333; 653 NW2d 176 (2002).[10]

The panel did not adopt wholesale the reasoning of the courts that sanctioned respondent or the claims of the Administrator about what those courts said or did. Rather, the panel sifted the evidence, including the court's orders, and dismissed some of the allegations against respondent.

Throughout the proceedings, the Grievance Administrator sought a stipulation and a ruling from the panel in order to obviate the need to bring in live witnesses to testify as to the contents of the orders. He got both and proceeded accordingly. Respondent indicated in his discovery response that he would rely upon the exhibits himself, stipulated to the admissibility of the exhibits at a prehearing conference, and confirmed the same at a later hearing. It would be grossly inefficient and more than a little unfair in this particular case to now hold that the documents were inadmissible. We affirm the panel's factual determination that the admission of Petitioner's Exhibits 1-27 was stipulated to and find no error in the panel's reliance upon this evidence to prove the allegations of the formal complaint.

---

[10] "[T]he fact that defendant had been convicted of assault and battery for the same conduct that plaintiff is now seeking civil damages for certainly 'would have a tendency to make the existence of any fact that is of consequence . . . more probable or less probable than it would be without the evidence.'" The court also found that MRE 403 did not preclude admission. The ruling did not specifically address documentary evidence, but was broad enough to invite introduction of court records.

C. Should the Panel Have Been Disqualified After Considering and Approving the Stipulations for Consent Orders of Discipline by the Co-Respondents?

Respondent's brief on review offers a short argument on this issue which consists of two components. First, there is the argument set forth in the statement of this issue and its argument heading - the two co-respondents, Hammonds and Nabwangu, consented to discipline along the way to hearing and through "exposure to admissions of misconduct by Respondent's former co-respondents . . . the panel was exposed to information bearing on the Respondent's culpability which compromised its ability to hear this matter in a fair and impartial manner." (Respondent's Brief, p 14.) This argument is not developed at all beyond this conclusory assertion. In fact, Ms. Hammonds pled nolo contendere to neglect/lack of diligence for her role here.[11] Mr. Nabwangu was charged in another formal complaint involving charges unrelated to this one. In that case (10-139-GA) he was alleged to have neglected and failed to communicate with several clients, and to have failed to return some unearned fees. Exposure to that information and those admissions could not have prejudiced Respondent Reed. In this case, Mr. Nabwangu pled only to "Knowingly disobeying an obligation under the rules of a tribunal in violation of MRPC 3.4(c)." Thus, there is little overlap between Hammonds' plea and the panel's ultimate findings regarding respondent, and no overlap with respect to Nabwangu. It has not been established, or even persuasively argued, that Board Chairperson Danhof erred in his September 27, 2011 order denying disqualification of the panel on these grounds.

Respondent also argues that the panel should have been disqualified because of the attachment of the exhibits to the formal complaint. Respondent essentially contends that a Board order in *Grievance Administrator v Leonard C. Jaques*, DP 7/86 (ADB Order 1995), constitutes support for the proposition that a panel must be disqualified whenever a court order is attached to a complaint. This argument also lacks merit. First, the *Jaques* order was declared "distinguishable" in the September 27, 2011 order denying the motions of respondents Reed and Hammonds to

---

[11] The pertinent part of Ms. Hammonds' stipulation for consent discipline reads:

> 2. Respondent Stephanie L. Hammonds pleads no contest to the allegations of misconduct contained in paragraph 50(b) of Count III of the Formal Complaint in ADB Case No. 10-138-GA that she failed to act with reasonable diligence and promptness in representing a client in violation of MRPC 1.3.
>
> 3. Petitioner voluntarily dismisses the remaining allegations of misconduct contained in paragraph 50 of Count Ill of the Formal Complaint in ADB Case No.10-138-GA with prejudice.

disqualify the panel on the very grounds asserted here. Second, to the extent *Jaques* might be read to support the notion that a hearing panel needs protection from potentially inadmissible evidence, as would a jury, this argument has been rejected repeatedly by the Board, as is reflected in a recent order denying a stipulated request to refer an evidentiary matter to a master for a ruling on admissibility. There, the Board explained:

> The Attorney Discipline Board has considered respondent's motion to refer an evidentiary matter to a master, and petitioner's response, and is otherwise fully advised. The motion is **DENIED** for the following reasons.
>
> MCR 9.115(A) provides: "Except as otherwise provided in these rules, the rules governing practice and procedure in a nonjury civil action apply to a proceeding before a hearing panel." 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.
>
> 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), lv 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 order 2012).]

Respondent has not established that the orders denying disqualification of the panel were erroneously entered by the Board Chairperson.

D. Did the Panel Err in Finding Misconduct by Respondent for Failure to Report Misconduct by Attorney Nabwangu?

This finding of misconduct is premised on MRPC 8.3, the pertinent part of which provides:

> **Rule: 8.3 Reporting Professional Misconduct**
> (a) A lawyer having knowledge that another lawyer has committed a *significant violation* of the Rules of Professional Conduct that raises a *substantial question* as to that lawyer's *honesty, trustworthiness, or fitness as a lawyer* shall inform the Attorney Grievance Commission. [Emphasis added.]

The misconduct report states:

> This panel finds that Nabwangu's failure to comply with a court order or, for that matter, take any action regarding the payment of the sanction Magistrate Rodovich imposed amounts to a significant violation of the rules of professional conduct. Therefore, respondent had an obligation to report Nabwangu's misconduct to the AGC. He did not. Respondent did not adequately defend this failure at the hearing. Thus, the panel finds that respondent violated MRPC 8.3(a) by failing to report Nabwangu's misconduct to the AGC. [Hearing Panel Report on Misconduct, p 9]

Respondent argues that the text and comment of Rule 8.3(a) make it clear that not every violation of the Michigan Rules of Professional Conduct must be reported by other members of the bar. He further argues that the basis for the panel's finding that Nabwangu committed a significant violation of the Rules of Professional Conduct was not set forth in the panel's report. Finally, respondent argues that Nabwangu's nonpayment may not have implicated his honesty, trustworthiness, or fitness as a lawyer. It may have been because he didn't have the money. Additionally, under the rule, a "substantial question" as to Nabwangu's honesty must be raised by his nonpayment.

The Administrator does not address the elements of MRPC 8.3(a) or respondent's arguments that they have not been established. Reference is, however, made to Respondent's Exhibit 4, a letter from respondent urging Mr. Nabwangu to pay the sanctions awarded against him.

The Administrator references Nabwangu's alleged failure to petition for pro hac vice admission, misconduct Nabwangu did not admit and was not found to have committed. The Grievance Administrator concludes: "Respondent Nabwangu's misconduct in his representation of Ms. Janky and other matters subsequently resulted in the suspension of his license to practice law." (Petitioner's Response Brief, p 11.) There has been no showing or assertion that respondent knew anything about other misconduct by Nabwangu.

Proper evidentiary support for the panel's finding that respondent violated MRPC 8.3(a) has not been presented to the Board. Accordingly, the order of discipline will be modified and the allegation that MRPC 8.3(a) has been violated will be dismissed.

E. Did the Panel Err in Finding Misconduct by Respondent for Filing *Janky III*?

The *Janky III* complaint was dismissed in a 23-page opinion (Petitioner's Exhibit 26) and order by Judge Philip Simon of the Northern District of Indiana. Page 6 of Judge Simon's Memorandum Opinion and Order provides a concise history of *Janky III*:

> After receiving her verdict in federal court, and while appeals were already pending in that case, Janky filed yet another federal complaint- this case- in the Northern District of Indiana. (DE 1.) This newest (and shortly thereafter amended) complaint named not only the LCCVB as a defendant, but also the LCCVB board of directors in their individual capacities; the CEO of LCCVB- Speros Batistatos; and the LCCVB's attorneys- Timothy Jordan, Robert Goldstein, and Daniel Kuzman. (DE 1; DE 11.) Janky now alleges that these defendants committed the tort of abuse of process by asserting their defenses in the earlier case. (DE 11 at ¶ 21.) The complaint tacks on counts alleging violations of the Fifth Amendment and §1983, as well as a negligence claim, all based on the Defendants' pleadings. (Id. at ¶¶ 29-45.) It was this complaint that brought the parties before me.

Judge Simon also ordered respondent to show cause why Rule 11 sanctions should not be imposed. Petitioner's Exhibit 27 is the opinion and order imposing Rule 11 sanctions pursuant to Exhibit 26. Both of these opinions summarize five decisions in the Eastern District of Michigan wherein respondent was found to have filed frivolous litigation.

Exhibit 27 shows a bit of exasperation and some plain speaking, but the legal and factual analysis to support Fed R Civ P 11 sanctions is clearly set forth in great detail. It is a solid analysis and not a complicated one: respondent was told in answer to a motion for fees that the "work for hire" defense was not frivolous. His remedies, on behalf of his client, were to move for reconsideration or appeal. He did both, but he also filed *Janky III*. He lost the motion to reconsider and the appeal was pending at the time the sanctions order was issued in *Janky III*. Respondent was ordered to pay $10,000, Ms. Hammonds was ordered to pay $5,000, and Ms. Janky was ordered to pay $1,000.

Respondent's argument on review is that the panel simply adopted the federal court's analysis. In fact, the panel appears to have carefully considered the evidence in support of each allegation, and,

even if the panel were to have essentially adopted or agreed with the federal court's analysis, this would not warrant reversal. Respondent was not precluded from introducing evidence showing that the court made a factual or legal error. But, he has not done so. Instead, he continues to advance his basic argument that it was wrong for the panel to rely on the federal court order and require him to rebut it.

The standard for this Board's review of a hearing panel's findings of fact is described in *Grievance Administrator v Edgar J. Dietrich*, 99-145-GA (ADB 2001), p 2:

> 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). See also, *Grievance Administrator v T. Patrick Freydl*, 96-193-GA (ADB 1998). "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)).
>
> Because the hearing panel has the opportunity to observe the witnesses during their testimony, the Board defers to the panel's assessment of their demeanor and credibility. *Grievance Administrator v Neil C. Szabo*, 96-228-GA (ADB 1998); *Grievance Administrator v Deborah C. Lynch*, No 96-96-GA (ADB 1997). See also *In re McWhorter*, 449 Mich 130, 136 n 7 (1995).
>
> In short, "it is not the Board's function to substitute its own judgment for that of the panels' or to offer a de novo analysis of the evidence." *Grievance Administrator v Carrie L. P. Gray*, 93- 250-GA (ADB 1996), lv den 453 Mich 1216 (1996).

As the Board said in *Grievance Administrator v Robert E. Jones*, 05-09-GA (ADB 2007), pp 5-6:

> Under the standard of review discussed above, and under the clearly erroneous standard employed when an appellate court reviews a circuit court decision, great deference is afforded to the trier of fact who heard the evidence first hand. "A finding is clearly erroneous if the reviewing court, on all the evidence, is left with a definite and firm conviction that a mistake has been committed. . . . Under this standard, the reviewing court cannot reverse if the trial court's view of the evidence is plausible. . . . Deference is given to the special opportunity of the trial court to judge the credibility of witnesses. MCR 2.613(C)." *Thames v Thames*, 191 Mich App 299, 301-302 (1991).

The panel here heard Mr. Reed's testimony and explanation as to why the federal court was incorrect. The panel found that his testimony did not rebut the evidence submitted by the Administrator. There is proper evidentiary support for the panel's decision.

F. Did the Hearing Panel Err in the Level of Discipline Imposed?

Both parties raise the appropriate level of discipline as an issue in their briefs in support of their respective petitions for review.

The Administrator's brief describes the misconduct in full detail, and argues that the appropriate ABA Standards to be applied call for suspension. This is what the panel concluded. The Administrator requests a suspension of "not less than 180 days" and the retention of the CLE condition imposed by the panel, citing *Grievance Administrator v Raymond A. Macdonald*, 09-43 (HP 2010), aff'd (ADB order 2010). In that case, the panel imposed, and the Board affirmed, a two year suspension with a CLE condition and a requirement that respondent pass the Multistate Professional Responsibility Exam for violations similar to those at issue here – MRPC 3.1 ("A lawyer shall not bring or defend a proceeding ... unless there is a basis for doing so that is not frivolous."). However, respondent Macdonald was also found to have violated MRPC 3.4(c) ("A lawyer shall not ... knowingly disobey an obligation under the rules of a tribunal"). He also had prior discipline: two reprimands and an admonishment.

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*, No. 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. *Grievance Administrator v Lopatin*, 462 Mich 235, 247; 612 NW2d 120 (2000).

It has often been said that "attorney misconduct cases are fact-sensitive inquiries that turn on the unique circumstances of each case" *Grievance Administrator v Deutch*, 455 Mich 149, 166; 565 NW2d 369 (1997). The appropriate discipline for frivolous litigation can range from reprimand to revocation. The case offered by the petitioner does not establish that the panel's suspension of 90 days is insufficient to protect the public, the courts and the profession.

Respondent does not argue that the reprimand Standard applies, but contends that the hearing panel misapplied the aggravating and mitigating factors. We find no basis to disturb the panel's ultimate conclusion that a suspension is appropriate.

G. Did the Hearing Panel Err in Not Finding Additional Misconduct?

Pages 4-17 of the Administrator's brief in support of his petition for review follow the heading, "The Hearing Panel erred in not finding additional misconduct." These pages revisit the facts and simply assert that the panel erred in not finding additional misconduct. We find no basis to conclude that the panel so erred.

IV. Conclusion

The parties have raised various claims of error, including the arguments that the panel incorrectly found misconduct or failed to find misconduct and imposed an inappropriate discipline for the misconduct established. Respondent also argued that MCL 600.2106 does not provide for the admissibility of orders and judgments of courts other than Michigan courts, but we need not address that issue because we affirm the panel's factual finding that the respondent stipulated to the admission of petitioner's exhibits 1-27.

With respect to the remaining claims of error, we find that they lack merit, with the exception of respondent's argument as to his failure to report the misconduct of Francois Nabwangu.

Accordingly, we shall enter an order modifying the order of discipline by dismissing the MRPC 8.3(a) allegations, and affirming the panel's order in all other respects.

Board members James M. Cameron, Jr., Craig H. Lubben, Rosalind E. Griffin, M.D., Dulce M. Fuller, and Michael Murray concur in this decision.

Board members Carl E. Ver Beek, Sylvia P. Whitmer, Ph.D., and Lawrence G. Campbell would have increased discipline to a 180-day suspension.

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