STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellee,

v

Daniel L. Mercier, P 72620,

Respondent/Appellant,

Case No. 11-24-GA

Decided: April 3, 2014

Appearances:

Frances A. Rosinski, for the Grievance Administrator, Petitioner/Appellee
Daniel L. Mercier, In Pro Per, for the Respondent/Appellant (brief on review) and,
Philip J. Thomas, for the Respondent/Appellant (at argument)

BOARD OPINION

Tri-County Hearing Panel #67 found that respondent, while he was an applicant for admission to the State Bar of Michigan, failed to update his affidavit of personal history in support of his application, thereby violating MRPC 8.1(b)(2) (continuing obligation to assure truthfulness of affidavit accompanying bar application) and MRPC 8.4(b) (dishonest conduct), among other rules. The panel issued an order of disbarment in this matter, and respondent has petitioned for review. The Attorney Discipline Board has conducted review proceedings in accordance with MCR 9.118. For the reasons discussed below, we will modify the discipline imposed by the panel and order that respondent's license to practice law in Michigan be suspended for three years.

Respondent graduated from law school in Florida in 1998 and sought admission to practice law in Michigan. In 2001, respondent was denied admission to the Michigan bar by the Board of Law Examiners. In March of 2006, respondent again sought admission to practice law in Michigan. As part of the application process, respondent was required, as are all applicants, to acknowledge in his own handwriting that he had a continuing obligation to immediately inform the Standing

Committee on Character and Fitness if any of the answers in his personal history affidavit included with his application to the bar ceased to be true.[1] On April 6, 2007, respondent was found by the Standing Committee on Character and Fitness to have the requisite character and fitness for admission to the Michigan bar, subject to passing the Michigan Bar Examination. In July of 2008, respondent took the bar examination, but learned in November of 2008 that he had failed the examination. In February of 2009, respondent took the bar examination again, and subsequently passed. On May 26, 2009, respondent was sworn in. On June 1, 2009, he was assigned a bar license number (P number) by the State Bar of Michigan.

The Grievance Administrator filed a formal complaint against respondent in which it was alleged that he intentionally failed to inform the State Bar of Michigan's Standing Committee on Character and Fitness (the State Bar) of criminal charges originating from the City of Grosse Pointe on April 30, 2009, and a personal protection order that was served on him on May 27, 2009. It was further alleged that respondent's failure to do so constituted "a misrepresentation by omission of relevant information," engaged in by respondent so that he could obtain admission to the State Bar of Michigan. The formal complaint specifically charged violations of MRPC 8.1(b)(2),[2] 8.4(a), and 8.4(b), and MCR 9.104(A)(2)-(4).[3] Respondent filed an answer to the complaint denying the allegations of misconduct.

The Grievance Administrator filed a first amended formal complaint which alleged that, in addition to the two matters referenced in the original formal complaint, respondent also received a citation on January 15, 2009, for failing to stop and identify himself at the scene of a property

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[1] Applicants are required to acknowledge, in their own handwriting, the following: "The answers in this affidavit are to be considered as continuing to be true from the date of this affidavit until the date of my admission to the State Bar of Michigan, and if any answer or portion of an answer ceases to be true, I acknowledge that I have a continuing obligation to inform and I will immediately inform the Standing Committee on Character and Fitness."

[2] 8.1(b) An applicant for admission to the bar

* * *

(2) has a continuing obligation, until the date of admission, to inform the standing committee on character and fitness, in writing, if any answers in the applicant's affidavit of personal history change or cease to be true.

[3] MCR 9.104 was subsequently amended in 2011, after the formal complaint in this matter was filed, to eliminate the "(A)."

damage accident and for careless driving. Again, it was alleged that respondent violated the foregoing rules by intentionally failing to inform the State Bar of the criminal charges and personal protection order in order to obtain admission to the State Bar of Michigan, thus committing "a misrepresentation by omission of relevant information." Respondent's amended answer admitted the factual statements, but indicated that, for an approximate six month time period when the three incidents occurred, he was "going through personal problems including his impairment from the use of alcohol," and that he "did not make a conscious decision, or act intentionally in failing to report the incidents." At the August 29, 2011 hearing, respondent acknowledged the admissions made in his amended answer and admitted to violating MRPC 8.1(b)(2) and 8.4(a) and (b). With regard to MRPC 8.4(b), respondent admitted that there was a misrepresentation by omission of relevant information, but denied that he had any intent to violate the provisions of the rule. (Tr 8/29/11, pp 29-30, 32.)

Following arguments and briefing as to the appropriate sanction, the panel ordered disbarment.

Respondent petitioned the Attorney Discipline Board for review of the hearing panel's order, arguing that the panel erred in making various evidentiary rulings and in ordering disbarment. The Grievance Administrator's reply brief argues for affirmance on the grounds that there was proper evidentiary support for the panel's findings of fact and misconduct; that the panel properly exercised its discretion in making evidentiary rulings; and that the panel appropriately applied the ABA Standards to determine that disbarment was the appropriate discipline to impose.

I. Hearing Panel Rulings.

A trial court's decision to admit evidence is discretionary and will not be disturbed "absent a clear abuse of discretion." *People v Aldrich,* 246 Mich App 101, 113; 631 NW2d 67 (2001). "An abuse of discretion occurs when the [trial] court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Unger,* 278 Mich App 210, 217; 749 NW2d 272 (2008). If a trial court admits evidence that as a matter of law is inadmissible, it abuses its discretion. *Id.* A trial court's decision on a close evidentiary question, however, cannot be an abuse of discretion. *People v Sabin (After Remand),* 463 Mich 43, 67; 614 NW2d 888 (2000). Claims of

error as to rulings excluding evidence must be preserved by an offer of proof. MRE 103(a)(2). And, to require reversal, any error must not be harmless. MCR 9.107(A); MCR 2.613(A).[4]

Respondent contends that the panel erred in sustaining the Administrator's objections to testimony supporting respondent's assertion that MCR 9.121(C) applied here.[5] The panel upheld the Grievance Administrator's objections and did not allow further testimony because respondent could not show, as required by MCR 9.121(C)(1)(a), that during the period when the conduct that is the subject of the complaint occurred, respondent's "ability to practice law competently was materially impaired." (Tr 5/24/12, pp 98-100.) The Administrator also argued that the testimony of Molly Dean, a clinical counselor with the State Bar of Michigan's Lawyers and Judges Assistance Program (LJAP), would not establish this point because Ms. Dean had not met respondent prior to August 2011 when his alcohol dependency was assessed before he entered into a two year treatment contract with LJAP. (Tr 5/24/12, pp 79, 103-105.)

The conduct that is the subject of the complaint in this matter, respondent's failure to update his affidavit to disclose the events of early 2009, clearly occurred during a time when respondent was an applicant to the bar, not a practicing lawyer. The panel's decision to follow the plain language of the rule and deny respondent's use of MCR 9.121(C) was not an abuse of discretion. And it certainly was not a violation of due process, as respondent suggests in comparing the applicability

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[4] MCR 2.613(A) provides, in relevant part: "An error in the admission or the exclusion of evidence...is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice."

[5] MCR 9.121provides the following:

(C) Assertion of Impaired Ability; Probation

(1) If, in response to a formal complaint filed under subrule 9.115(B), the respondent asserts in mitigation and thereafter demonstrates by a preponderance of the evidence that

(a) during the period when the conduct that is the subject of the complaint occurred, his or her ability to practice law competently was materially impaired by physical or mental disability or by drug or alcohol addiction,
(b) the impairment was the cause of or substantially contributed to that conduct,
(c) the cause of the impairment is susceptible to treatment, and
(d) he or she in good faith intends to undergo treatment, and submits a detailed plan for such treatment, the hearing panel, the board, or the Supreme Court may enter an order placing the respondent on probation for a specific period not to exceed 3 years if it specifically finds that an order of probation is not contrary to the public interest.

of MRPC 8.1 to the inapplicability of MCR 9.121. While it may seem incongruous to apply one and not the other, respondent's argument makes the very point that rules of professional conduct and rules of procedure to enforce them ordinarily do not apply to applicants for admission to the bar. MRPC 8.1(b) is an exception because of its specific and unique wording.

In any event, respondent did not make an offer of proof below or persuasive argument on review that probation under MCR 9.121(C) would be available or appropriate.

A central issue in this case was respondent's state of mind during the period when he failed to update his affidavit. Respondent was not precluded from arguing that he did not knowingly or intentionally fail to update his application. Indeed, he characterized his own testimony in a sanctions brief as follows: "he never really made a conscious decision to not report his court cases to Character and Fitness, it just wasn't something that he thought about."

After noting respondent's admission that he violated MRPC 8.1(b)(2) and 8.4(a) and (b), the panel made the following findings:

> Here, respondent has violated his duties to the public (ABA Standard 5.0) and to the profession (ABA Standard 7.0) by admittedly engaging in a misrepresentation by omission by failing to inform the Standing Committee that, prior to his date of admission to the State Bar of Michigan, he had been charged with two separate misdemeanors rendering his Personal History Affidavit no longer true and accurate. The panel also finds that respondent intentionally and knowingly failed to update his Personal History Affidavit with the intent and hope that he would *finally* obtain his law license. Respondent stipulated that he had full knowledge of the fact that he was required to supplement his Personal History Affidavit and, indeed, previously supplemented his original Personal History Affidavit. (Tr 08/29/11, pp 61-62). Respondent also admitted that he knew if he were arrested it would hurt his ability to be admitted to the practice of law. (Tr 05/24/12, p 59.) Testimony revealed that, in 2009, respondent had nothing – no income, no law license and no prospects. (Tr 05/24/12, p 209.) [HP Report, p 3; emphasis in original.]

The Administrator introduced significant evidence to support the theory that respondent was cognizant of many things during the relevant period, and that such awareness and high functioning of respondent in those instances would be inconsistent with claims that he was unaware of his failure

to update his affidavit or of his duty to do so. The panel noted that the evidence to sustain such a finding included respondent's own testimony:

> Q. But you knew when you were worried about being thrown in jail that if you were arrested and thrown in jail it was going to hurt your ability to be admitted to the practice of law, and you told your friends that? And your acquaintances?
>
> A. I know that a lot of things crossed my mind.
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> Q. That's a yes-or-no answer.
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> CHAIRPERSON GRAMZOW: Please answer yes or no, Mr. Mercier.
>
> A. I knew.
>
> BY MS. ROSINSKI:
>
> Q. That you told your friends and acquaintances that if you were arrested, it was going to affect your ability to be licensed in the state of Michigan?
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> A. I may have said something like that. [Tr 5/24/2012, pp 59-60.]

Finally, although precluded from eliciting further testimony regarding the elements of MCR 9.121(C), respondent was not precluded from introducing mitigating evidence, such as testimony to support the elements of ABA Standard 9.32(i),[6] and respondent did elicit testimony to the effect that he was getting the appropriate treatment for his addiction. (Tr 5/24/12, p 115.)

Respondent also argues that the panel committed a "highly prejudicial error" in denying him the right to present character witnesses pursuant to MRE 608.[7] Susan Hubbard had a child with

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[6] ABA Standard 9.32(i) provides that mental disability or chemical dependency including alcoholism or drug abuse can be considered in mitigation when:

> (1) there is medical evidence that the respondent is affected by a chemical dependency or mental disability;
> (2) the chemical dependency or mental dependency caused the misconduct;
> (3) the respondent's recovery from the chemical dependency or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and,
> (4) the recovery arrested the misconduct and recurrence of that misconduct is unlikely.

[7] MRE 608 provides, in relevant part: "(a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these

respondent and represented him during character and fitness proceedings. She testified that she met respondent in 1999 when she was a defense attorney in the Wayne County Juvenile Court and respondent was a student prosecutor. (Tr 5/24/12, p 156.) Ms. Hubbard and respondent had a daughter together who was born in January of 2001. She had never known respondent to drink alcohol until she saw him drinking wine on a few occasions in 2008 and 2009. (Tr 5/24/12, pp. 159-160, 162, 179, 206.) At the time, she believed respondent was on a "downward spiral" and becoming self-destructive because his house was in foreclosure, he was eventually evicted, was living with his grandparents, and was bitter about the whole process of trying to get licensed. (Tr 5/24/12, pp 163, 176, 180, 208-209.) In May of 2009, a series of positive events occurred including passing the bar examination that got respondent "back on track." (Tr 5/24/12, p 177.) Ms. Hubbard testified that after respondent stopped drinking she had no hesitation in co-parenting with respondent or entrusting her daughter to his care, and recited various positive attributes regarding his parenting.

When specifically asked whether she had an opinion about respondent's character for truthfulness and honesty when he is not drinking as opposed to when he is using alcohol, the panel sustained an objection by the Administrator on the grounds that respondent's character for truthfulness or untruthfulness had not been attacked. (Tr 5/24/12, pp 170-171, 198-200.)

Respondent's claim that the panel erred in excluding testimony from various witnesses regarding his character for truthfulness lacks merit for several reasons. First, based on the arguments and citations to the record and law in respondent's brief on review, it has not been shown that the panel abused its discretion in applying MRE 608. Further, as to character witnesses generally, none of the other witnesses subsequently referred to by respondent as such were on respondent's amended witness list, and after careful consideration the panel limited respondent to the listed witnesses with the exception of Ms. Dean. (Tr 5/24/12, pp 147-148, 150.) We find no error or unfairness in this decision. Finally, respondent waived the right to call additional witnesses. (Brief in Support of Respondent's Answer to Grievance Administrator's Motion to Strike Witness Thomas C. Fitzpatrick, pp 1, 4.)[8]

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limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise."

[8] Respondent has attempted, in June and October of 2013, to supplement this record with affidavits of Ms. Hubbard attesting to respondent's excellent reputation, to comments by the Chairperson of the Standing

Finally, as the Administrator's brief asserts: "Respondent belatedly argues that MRPC 8.4(a) and (b) do not apply to him because he was an applicant to the Bar, not a lawyer, at the time he engaged in the conduct at issue." Although respondent may have a point, we need not decide this issue.[9] The Administrator also contends that respondent's violation of MRPC 8.1(b)(2) warrants the discipline imposed by the panel. We are of the opinion that the presence or absence of a conclusion that respondent violated MRPC 8.4(a) and (b) does not change the calculus with regard to the appropriate level of discipline in this case.

In summary, none of respondent's claims of error require reversal or modification of the panel's findings with regard to misconduct.

II. Level of Discipline.

In accordance with the holding of *Grievance Administrator v Lopatin,* 462 Mich 235 (2000), the Board and its hearing panels follow the American Bar Association (ABA) Standards for Imposing Lawyer Sanctions (Standards) in determining the appropriate level of discipline to impose when misconduct has been established. Also, under *Lopatin,* it is the Board's duty on review to assure consistency, continuity and proportionality in discipline, taking into account the Standards and factors including precedent and the particular circumstances of the case. See, e.g., *Grievance Administrator v Kathy Lynn Henry*, 09-107-JC (ADB 2010), *Grievance Administrator v Albert J. Dib,* 02-78-GA (ADB 2007), and *Grievance Administrator v Ralph E. Musilli*, 98-216-GA (ADB 2000).

In applying the Standards, panels start by examining the factors set forth in ABA Standard 3.0 – the duty violated, the lawyer's mental state, injury caused – to help select applicable standards recommending generally appropriate discipline. The panel in this matter did so, and focused on

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Committee on Character and Fitness leaving her "with the clear impression" that respondent had no further duty to update his affidavit of personal history, and that "there was no intent on Mr. Mercier's part to violate any rules." The affidavit also revisits some of her testimony before the panel. We find no good cause to consider this attempt to enlarge the record, and the contents have not, therefore, been considered by this body in making this decision. Additionally, testimony consistent with the affidavit (such as testimony as to respondent's state of mind, or a committee member's asserted utterance ostensibly at variance with MRPC 8.1 or the terms of the Bar application) would almost certainly not be admissible or persuasive in any event.

[9] See, Ronald D. Rotunda & John S. Dzienkowski, *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility 2013-2014*, §8.1-1(a), pp 1278-1279 (Noting that Model Rule 8.1 is an exception to the following axiom: "The Model Rules, in general, do not govern nonlawyers.").

ABA Standards 5.0 and 7.0. The panel also referenced only the failure to update the application as to the two misdemeanor charges:

> Here, respondent has violated his duties to the public (ABA Standard 5.0) and to the profession (ABA Standard 7.0) by admittedly engaging in a misrepresentation by omission by failing to inform the Standing Committee, that prior to his date of admission to the State Bar of Michigan, he had been charged with two separate misdemeanors rendering his Personal History Affidavit no longer true and accurate. [HP Report 1/22/13, p 3. Emphasis added.]

The allegations regarding failure to inform the State Bar of the personal protection order (PPO) served upon respondent on May 27, 2009 were not referenced in the panel's report. Respondent argues that this is appropriately excluded from the findings of misconduct for which sanctions are to be imposed because he did not have a duty to report a PPO "that was issued without a hearing and without notice to respondent" and served upon him "the day after he was sworn-in as a lawyer." It appears that the hearing panel did not include this among the acts of misconduct for which discipline was imposed.

MRPC 8.1(b)(2) provides that "an applicant for admission to the bar has a continuing obligation, until the *date of admission*, to inform the standing committee on character and fitness, in writing, if any answers in the applicant's affidavit of personal history change or cease to be true" (emphasis added). The amended formal complaint references not only the January and April 2009 incidents (the Birmingham and Grosse Pointe incidents), but also the PPO issued against respondent in May of 2009. Our review of Rule 15, Sec. 3 (1) and (2)[10] of the Rules Concerning the State Bar, calls into question whether respondent had a duty to update his affidavit to disclose the issuance of this PPO. Respondent's admission was moved and he took his oath on May 26, 2009. (Tr 8/29/11, pp 139-140.) Therefore, respondent was admitted to the bar of this State, pursuant to the provisions of Rule 15 of the Rules Concerning the State Bar, on May 26, 2009. It was not until the next day,

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[10] Rule 15, Sec. 3 states, in relevant part: "(1) Each applicant to whom a certificate of qualification has been issued by the Board of Law Examiners is required to appear personally and present such certificate to the Supreme Court or one of the circuit courts of this State. Upon motion made in open court by an active member of the State Bar of Michigan, the court may enter an order admitting such applicant to the bar of this State. The clerk of such court is required to administer to such applicant in open court the following oath of office . . . (2) The applicant is required to subscribe to such oath of office by signing a copy and to register membership in the State Bar of Michigan in the manner prescribed in Rule 2 of these rules and to pay the required dues before practicing law in this State."

May 27, 2009, that respondent received actual notice of the personal protection order issued by the Wayne County Circuit Court. The affidavit of personal history was not admitted into evidence (and the Administrator does not contest this ruling on review). Perhaps, in light of the lack of detail in the record regarding respondent's asserted duty to update his affidavit with respect to the PPO, the panel did not consider this as a basis for misconduct, or at least did not consider it one which constituted a clear violation of the rules warranting adjustment of the sanction to be imposed for failing to disclose the two criminal charges notwithstanding respondent's pleadings and briefing below.[11]

In assessing which of the ABA Standards afford appropriate guidance here, the panel noted the discussion in the commentary to Standard 7.1, which cites *In Re W. Jason Mitan*, 75 Ill 2d 118; 387 NE2d 278 (1979), cert den 444 US 916 (1979). There, the respondent was disbarred for making false statements and deliberately failing to disclose certain information on his bar application. The Administrator relies on *Mitan*, while respondent distinguishes it, noting that respondent Mitan was found to have made several false statements in addition to failing to disclose a felony conviction. Here, respondent argues that he "is not charged with making false statements or concealing information on his 2/28/06 bar application. Rather, he was charged with failing to update his application three years after completing it, before being sworn in as an attorney, to include two misdemeanor charges that were later dismissed."

The black letter language of Standard 7.1 contemplates disbarment when "a duty owed as a professional" is knowingly violated with the intent to obtain a benefit and causes "serious or potentially serious injury to a client, the public, or the legal system."[12] The panel below found that "no evidence exists to establish actual injury in this case," but that potential injury may be inferred. The hearing panel then applied Standard 7.1 rather than Standard 7.2 (suspension).

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[11] Respondent admitted that the PPO was relevant to his character and fitness, but denied intentional failure to report it to the State Bar. (Respondent's First Amended Answer to First Amended Formal Complaint, p 3 ¶25.) Respondent's sanction brief offered a conclusion of law to the effect that his failure to disclose the PPO constituted a violation of MRPC 8.1(b)(2).

[12] At the time the commentary was written, Standard 7.1 spoke of a "violation of a duty owed to the profession." In 1992, the text of the Standard was amended by the ABA House of Delegates to apply to "violation of a duty owed as a professional."

The panel also applied Standard 5.11(b), which provides that disbarment is generally appropriate when "a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice."

Precedent is an important factor that the Michigan Supreme Court has directed the Board and hearing panels to consider in applying the ABA Standards. *Lopatin, supra,* p 248 n 13. Respondent cites a wide variety of cases in his brief on sanctions below, presumably to address the proportionality of a sanction for his misconduct in light of other ethical violations. Some of the cases deal with dishonesty and misrepresentation in different settings. The Administrator cites, in his sanctions brief, cases from other jurisdictions imposing disbarment for materially false statements on bar applications. See, e.g., *In Re Demos*, 875 A2d 636 (DC 2005) (collecting cases involving misrepresentations and nondisclosure in bar applications and comparing them to dishonest conduct in other settings).

Turning to Michigan cases which may have some bearing on determining the appropriate discipline in this case, we note that, notwithstanding Standard 5.11(b)'s guidance as to generally appropriate sanctions for certain dishonest conduct, there exists significant precedent for the imposition of a sanction less than disbarment in various circumstances involving knowing or deliberate misrepresentation. *See, e.g., Grievance Administrator v Valerie Colbert-Osamuede*, 09-46-GA (ADB 2012) (applying Standard 6.1 for false submissions to a court and imposing a suspension of 18 months), *Grievance Administrator v Kathy Lynn Henry*, 09-107-JC (ADB 2010) (one-year suspension for attorney convicted of criminal contempt arising out of "willful acts, omissions, and statements designed to mislead the court"; citing other cases), *Grievance Administrator v Michael P. Knapp, Jr.*, 09-21-MZ (ADB 2011) (four-year suspension, after remand, affirmed for giving false testimony to a panel and fabricating an AA sign-in sheet), *Grievance Administrator v Michael L. Stefani*, 10-113-GA (ADB 2013) (referring to ABA Standard 5.1 in imposing a 30-day suspension for knowing misrepresentation to opposing counsel), and *Grievance Administrator v Leo C. Gilhool*, ADB 155-88 (ADB 1989) (Stating that: "Deliberate misrepresentation to a client has traditionally been viewed by the Board as misconduct warranting strict sanctions," and collecting cases imposing suspensions of various lengths requiring reinstatement.) Also pertinent are the cases of *Grievance Administrator v Murdock Hertzog*, 06-76-JC; 06-77-GA (ADB 2009) (discipline increased from 120-day suspension to 180-day suspension

for, in part, failing to disclose a criminal conviction on bar dues form; referencing Standard 7.2), and *Grievance Administrator v Timothy P. Murphy*, 12-57-JC; 12-58-GA (ADB Order, dated 8/8/2013) (increasing suspension from 60 to 180 days where "respondent knowingly and intentionally failed to disclose certain misdemeanor convictions as he was required to do under two separate procedural rules").

While these comparisons afford some guidance in arriving at a sanction that is proportional in light of other conduct involving deception or lack of candor, we also find it helpful to examine decisions in other jurisdictions involving affirmative misrepresentations and intentional or reckless omissions with respect to bar applications.[13] *See, e.g., In re Small,* 760 A2d 612 (DC 2000) (three-year suspension for failure to supplement initially truthful bar application with information relating to subsequent criminal charges); *In Re Jorge L. Rodriguez*, 753 NE2d 1289 (Ind 2001) (90-day suspension for failure to disclose dismissal from two colleges and suspension from one); *In Re Ronald D. Mikus*, 131 P3d 653 (NM 2006) (two-year suspension plus two-year probation for failure to supplement bar application with information about subsequent criminal indictment); and *In re Reema Nicki Bajaj,* M.R.26518 (Ill. order dated 3/14/2014) (granting consent petition and imposing three-year suspension for failure to disclose and misrepresentation on bar application, as well as criminal conduct).[14] See also, *Florida Board of Bar Examiners Re: Daniel Mark Zavadil*, 115 So

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[13] We agree with the Administrator that, despite some factual similarity, *Grievance Administrator v James Del Rio*, 407 Mich 336 (1979), is not helpful here. There, the Court specifically declared that it was "not convinced that respondent [Del Rio] sought to wilfully mislead the State Bar in his application for admission." The panel's findings here regarding respondent's failure to update his affidavit are markedly different.

[14] The petition for consent discipline in *Bajaj* contains a section entitled Recommendation and Discussion of Precedent, which cites a disbarment case and three additional Illinois decisions:

> *In re Connor*, MR 8711, 90 CH 117 (March 19, 1993) (false statements in law school application and bar application warranted suspension for 30 months and until further order of the Court). . . [,] *In re Chandler*, 161 Ill.2d 459 (1994), [in which] the Court suspended an attorney for three years and until further order of the Court after she lied to a mortgage lender about her income and employment history, and submitted false W-2 statements, tax returns and a false employment verification form. She also failed to inform the Character and Fitness Committee about the fraud she committed in obtaining the loan and the lender's ensuing foreclosure action. . . . [and] *In re Friedman*, 08 CH 32, M.R. 23720 (May 18, 2010), [three year suspension for] engag[ing] in a pattern of intentional deception to numerous entities, including making false statements on . . . three separate bar applications, between 1999 and 2000, [in which] Respondent falsely stated that he had not been detained, restrained, taken into custody, arrested, . . . or accused of a violation of any law or ordinance, when in fact he had been arrested and taken into police custody after he and four fraternity brothers solicited an undercover police officer for sex

3d 965 (Fla 2013) (license revoked for failure to update bar application; respondent disqualified from reapplying for admission for a period of 18 months from the date of revocation), and *In Re Bar Admission of Timothy C. Heckman*, 556 NW2d 746 (Wis 1996) (two-year period before reapplication to bar for omission of convictions and traffic violations and misrepresentations on applications to law school and two bar associations).

Respondent points out that had his omissions been discovered during the State Bar character and fitness process and his admission therefore denied, he would have had an opportunity to reapply after two years, and urges us to consider this waiting period as, to some extent, an indicia of a proportional sanction for this type of conduct.[15]

Another factor present in this case, but not touched upon in the panel report, is respondent's prior conduct of a similar nature. The record contains references to earlier applications to the bars of Florida and Michigan and in his law school application. During his testimony, respondent admitted that a 2000 report of the character and fitness committee which denied his admission referred to "lies, omissions and misleading statements." (Tr 5/24/2012, pp 36-39.) This document was not admitted into evidence by the hearing panel, however. (Tr 8/29/2011, pp 212-213.) This ruling was not challenged on review. Finally, as noted, the hearing panel did not discuss this prior conduct in its report.

In light of all of these factors, including the ABA Standards and the findings of the panel with regard to their elements, precedent in Michigan and elsewhere, and the record in this case, we conclude that a suspension of three years is the appropriate sanction in this matter. Should respondent petition for reinstatement after the expiration of this period, he will have the burden of proving by clear and convincing evidence his fitness at that time. Among the other requirements of MCR 9.123(B), respondent will have to establish that:

> taking into account all of the attorney's past conduct, including the nature of the misconduct which led to the revocation or suspension, he or she nevertheless can safely be recommended to the public, the courts, and the legal profession as a person fit to be consulted by

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in exchange for money. Respondent also engaged in a conflict of interest and argued positions that were materially adverse to his client's interests.

[15] The manager of the State Bar character and fitness department testified that an applicant denied admission would then have to wait two years before re-applying. (Tr 8/29/11, p 106.)

> others and to represent them and otherwise act in matters of trust and confidence, and in general to aid in the administration of justice as a member of the bar and as an officer of the court. [MCR 9.123(B)(7).]

Respondent will thus have the opportunity, as well as the obligation, to explain his past conduct and demonstrate that, notwithstanding such conduct, he meets the eligibility requirements for reinstatement.

For the reasons discussed above, we conclude that a three-year suspension of respondent's license is the appropriate sanction to impose in this matter, and we will enter an order modifying the hearing panel's order of discipline accordingly.

Board members Thomas G. Kienbaum, James M. Cameron, Jr., Sylvia P. Whitmer, Ph.D., Rosalind E. Griffin, M.D., Carl E. Ver Beek, Craig H. Lubben, Lawrence G. Campbell, Dulce M. Fuller, and Louann Van Der Wiele concur in this decision.