STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellant,

v

Valerie Colbert-Osamuede, P 42506,

Respondent/Appellee,

Case No. 09-46-GA

Decided: August 1, 2012

Appearances:

Cynthia C. Bullington, for the Grievance Administrator, Petitioner/Appellant
Donald D. Campbell, for the Respondent/Appellee before the hearing panel
Respondent, In Pro Per, on the review briefs
Brian D. Einhorn, for the Respondent/Appellee at the review hearing

BOARD OPINION

Respondent is the Chief Assistant Corporation Counsel of the Labor and Employment Division of the City of Detroit's Law Department. This case stems from her involvement in whistleblower litigation against the City of Detroit and former Mayor Kwame Kilpatrick as well as Freedom of Information Act (FOIA) litigation against the city. The hearing panel below found that respondent engaged in various types of misconduct, including failure to explain a matter to the extent reasonably necessary to permit her client to make informed decisions in violation of MRPC 1.4(b); representation of clients with directly adverse interests in violation of MRPC 1.7(a); making false statements of material fact to a tribunal and third persons and unlawfully obstructing another party's access to evidence in violation of MRPC 3.3(a)(1), 4.1, and 3.4(a), respectively; and, knowingly making a false statement of material fact in her sworn statement made to the Attorney Grievance Commission in violation of MRPC 8.1(a)(1). The panel ordered that respondent be suspended for 90 days. The Grievance Administrator has petitioned for review and seeks an increase in discipline. Respondent has cross-petitioned and challenges the findings of the hearing panel and raises other claims of error. We affirm the hearing panel's findings on misconduct and increase discipline to a suspension of 18 months.

The hearing panel's report on misconduct recites the following facts, at pages 2-3 (with bracketed material in the original):

> The allegations contained in the complaint arose out of the respondent's involvement in several lawsuits brought in Wayne County Circuit Court against the City of Detroit. The first set of cases, so-called "Whistle Blower" actions, alleged retaliatory actions had been taken by City of Detroit administrators against employees, and are entitled *Brown v City of Detroit*, Case No. 03-317557-NZ [hereinafter the "*Brown*" matter[1]], and *Harris v City of Detroit*, Case No. 03-337670-NZ [hereinafter the "*Harris*" matter]. Activities in these cases gave rise to a Freedom of Information Act [FOIA] action entitled *Detroit Free Press v City of Detroit*, Case No. 08-100214-CZ [hereinafter the "*FOIA*" matter]. Respondent, who is Chief Assistant Corporation Counsel of the Labor and Employment Division of the City of Detroit's Office of Corporation Counsel, participated in all of these cases.
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> [1] The *Brown* matter had been consolidated for trial with another "Whistle Blower" action involving Harold Nelthrope. Accordingly, reference may be made interchangeably to either the *Brown* or *Brown/Nelthrope* matters.
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> * * *
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> On September 11, 2007, jury verdicts were returned in the *Brown/Nelthrope* matters. (Ex 1, p 51.) On October 17, 2007, counsel for both sides met at the office of a local law firm for the purpose of negotiating the attorney's fees for plaintiffs' counsel through facilitation. At some point during the negotiations, plaintiffs' counsel, Michael Stefani, indicated he had received copies of text messages which indicated the Mayor of the City of Detroit and his Chief of Staff had committed perjury when they testified in the *Brown/Nelthrope* trial. This revelation served as a catalyst for settlement negotiations which ultimately culminated in the settlement of the *Brown/Nelthrope* matter, as well as the *Harris* matter. A draft settlement agreement was prepared at the facilitation meeting, and counsel traveled to Stefani's office where a more formalized agreement was prepared and signed. (Exs 20 and 21.) These agreements included reference to the text messages.
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> On October 19, 2007, the Detroit Free Press submitted a FOIA request to the City of Detroit seeking information in both the *Brown/Nelthrope* and *Harris* matters, which was to include "documents, attachments, exhibits, notes or other information related to the settlements." (Ex 27.) On October 27, 2007, the Mayor, Kwame Kilpatrick, rejected the settlement agreement of October 17, 2007. (Ex 30.)

After an exchange of numerous emails beginning on October 29, 2007, new settlement agreements were drafted and dated on November 1, 2007,[2] which lacked any reference to the text messages. (Ex 55 and 56.) The text messages became the subject of a third document, a confidentiality agreement, which was also signed on November 1, 2007. (Ex 57.)

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[2] Although these documents were dated November 1, 2007, according to the respondent they were actually executed on December 5, 2007. (Tr 11/30/10, p 39.)

On November 13, 2007, the Detroit Free Press submitted a second FOIA request to the City of Detroit seeking:

> The entire settlement agreements in the two separate Wayne County Circuit Court lawsuits between the above-mentioned parties [the *Brown/Nelthrope* and *Harris* matters]. This request includes but is not limited to all documents, attachments, exhibits, notes, records or other information related to the conclusion of the cases . . . . [Ex 64.]

In its response to the FOIA request dated December 7, 2007, which was granted in part and denied in part, the City provided only the November 1, 2007, settlement agreements. (Ex 68.) Thereafter, on January 3, 2008, the Detroit Free Press filed suit in Wayne County Circuit Court pursuant to Michigan's FOIA statute. In its answer to the complaint dated January 24, 2008, the City averred denials of specific allegations, "[F]or the reason that Defendant provided its record in its possession that are non-exempt from disclosure under the Michigan Freedom of Information Act and which are responsive to Plaintiff's request." (Ex 73, ¶'s 10, 11, and 17.) Also on January 24, 2007, the City filed affirmative and special defenses stating:

> The City of Detroit and its agents did not execute, participate, negotiate, possess, or was [sic: were] otherwise involved in any additional documents related to the settlement of *Brown and Nelthrope* v *City of Detroit, et al.* and *Harris v City of Detroit, et al.* (Ex 74, ¶ 8.)

As we have noted, the hearing panel found that respondent failed to apprise City Council of settlement terms first reduced to writing on October 17, 2007, requiring that the plaintiffs and their

attorney turn over the text messages to an attorney designated by the mayor and "refrain from disclosing to any person or entity the existence or content" of the text messages, and further providing for substantial liquidated damages to be paid to the City should the confidentiality provisions be breached. Respondent also made misrepresentations to the court and opposing counsel in the FOIA litigation to the effect that no agreements other than the November 1, 2007 agreements were known to the City's agents. The panel found misconduct as set forth elsewhere in this opinion. Respondent argues that there is insufficient evidentiary support for the findings and raises other claims of error. Alternatively, respondent argues that the hearing panel's imposition of a 90-day suspension should not be increased.

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). There is proper evidentiary support for the hearing panel's findings of misconduct in this case. With respect to the other issues raised by respondent, respondent first argues that the hearing panel chairperson should have been disqualified. The Board Chairperson denied two motions to disqualify the panel chairperson, and the Supreme Court denied respondent's petition for superintending control in an order dated March 5, 2010, thereby declining to review the latter determination. We find no error in the Board Chairperson's decisions. Additionally, respondent argues that the panel erred in assessing costs for the fees of the petitioner's expert witness. We find no error in the hearing panel's application of MCR 9.128.

The central issue in this review proceeding is whether the suspension imposed by the hearing panel is an appropriate and sufficient sanction for the misconduct established in this case. The Grievance Administrator argues that disbarment is the appropriate sanction for respondent's false statements of fact to the tribunal. Respondent contends that the 90-day suspension should be affirmed.

Counts Three and Four of the formal complaint deal with respondent's written and oral representations to a tribunal during the Freedom of Information Act (FOIA) litigation initiated by the Free Press in an attempt to obtain settlement agreements and drafts resolving the *Brown/Nelthrope* and *Harris* cases.

Count Three alleges that "On or about January 24, 2008, in the FOIA lawsuit, through Ellen Ha and Colbert-Osemuede, the City filed responsive pleadings to the Free Press's motion to expedite

discovery," which stated in part that: "The City of Detroit and its agents did not execute, participate, negotiate, possess, or was [sic] otherwise involved in any additional documents related to the settlement."[1] Count Three further alleges the violation of various rules, among them: MRPC 3.3(a)(1) (false statement of material fact to a tribunal); MRPC 3.4(a) (unlawful obstruction of another party's access to evidence); MRPC 4.1 (false statement to a third person); MRPC 8.4(b) and MCR 9.104(A)(3) (rules prohibiting dishonesty); MRPC 8.4(c) and MCR 9.104(A)(1) (prohibiting conduct prejudicial to the administration of justice); and, MRPC 8.4(a) (which prohibits violating the Rules of Professional Conduct through the acts of another).

Count Four alleges that respondent knowingly and intentionally made false statements to Wayne Circuit Judge Robert Columbo, Jr., during a hearing held in the FOIA case on January 25, 2008, and that respondent violated MRPC 3.3, among other rules.

The FOIA litigation had its genesis in FOIA requests by the Free Press as early as October 19, 2007, seeking "the entire settlement agreements" in both cases, including all documents, whether or not labeled confidential or drafted by City of Detroit lawyers.[2] After receiving only the November 1, 2007 settlement agreements, the Free Press commenced the FOIA litigation on January 3, 2008.

By January 24th, the Free Press had published the text messages, and, on that day, the Free Press filed an emergency motion to expedite discovery and seeking "secret settlement documents, which the Free Press believes directly reference and require the suppression of the referenced Skytel text messages."[3] That same day, January 24, 2008, respondent approved the City's response to the emergency motion, which stated: "The City of Detroit and its agents did not execute, participate, negotiate, possess, or was otherwise involved in any additional documents [sic] related to the settlement of [*Brown/Nelthrope* and *Harris*]."[4] A hearing on the Free Press's motion was held the next day.

Herschel Fink, counsel for the Free Press, quoted from the morning paper at the January 25, 2008 hearing before Judge Columbo. Mr. Fink read parts of an article reporting that Michael Stefani

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[1] Formal Complaint, paragraphs 91-92.

[2] See P's Ex 27 (Oct. 19, 2007 request); see also P's Ex 64 (Nov. 13, 2007 request).

[3] Petitioner's Ex 75, p 2.

[4] Petitioner's Ex 76, p 3.

(attorney for the plaintiffs Brown, Nelthrope and Harris) had, on the previous day, acknowledged the existence of "a confidentiality agreement governing secret details surrounding the ex-cops' 8.4 million dollar settlement, which the City agreed to pay after Kilpatrick lied under oath during the trial about the affair. The City's lawyers have said no such agreement exists."[5]

Ellen Ha, an attorney in the City's Law Department and the designated FOIA coordinator, argued against the Free Press's motion to expedite. It is not disputed that Ms. Ha was then unaware of the October 17, 2007 agreement (or the November 1, 2007 confidentiality agreement), and did not intend to mislead Judge Colombo during her argument, which concluded as follows:

> THE COURT: Okay.
>
> Now, what did the language in your answer say in regard to Plaintiff's assertion to "additional confidential documents." If such documents exist, they could only be documents signed by individuals in their private capacity, and not public records subject to disclosure under the Michigan Freedom of Information Act. The City of Detroit and its agents did not execute, participate, negotiate, possess, or otherwise involved in [sic] any additional documents relating to the settlement of . . . Brown and Nelthrope vs. City of Detroit, et al, and Harris vs. City of Detroit, et al.
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> Why did you suggest, at least implicitly, that there might be some individual documents there? Do you think there might be?
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> MS. HA: There may be, but the City of Detroit did not participate in it.
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> THE COURT: Okay. Well - -
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> MS. HA: I can't say honestly here, standing up here, that there is or isn't.
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> * * *
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> THE COURT: Well, but there is some suggestion that there might be some private documents from that quote from Mr. Stefani in the newspaper, which makes me believe, if he's telling the truth, and I have no reason to believe he is not telling the truth, that there are other documents here.

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[5] Transcript of hearing on the motion to expedite discovery – Petitioner's Ex 78, pp 5-6.

> MS. HA: And that may be an evidence [sic] that Mr. Fink may have to prove to this Court. I don't think we can - - I mean, with all due respect to the paper, I don't think we can take judicial notice of what the paper said. And it may be, and I'm just speculating, yes, there may be some document that Mr. Stefani participated with the Mayor himself. I don't know. I mean, if Mr. Stefani says it is, then so be it. But I don't have any knowledge to contradict that statement today.[6]

After a brief discussion about ordering SkyTel to preserve the messages, Mr. Fink made a suggestion that prompted the exchange between respondent and Judge Columbo that is the subject of Count Four:

> MR. FINK: Your Honor, could I respectfully suggest that you ask Ms. Colbert the same questions you asked Ms. Ha, because I believe she does know exactly the answer to your questions. I do believe she was involved in the negotiation of this. I believe there may actually have been multiple confidentiality agreements, which were changed in response to Free Press FOIA requests. I believe she knows, and I don't think she'll lie to you.
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> THE COURT: Are there some private agreements out there?
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> MS. COLBERT-OSEMUEDE: I did not participate in the drafting, executing of any private agreement between the Mayor, Mr. Stefani, Christine Beatty, or anyone on their behalf. So, I am unaware of any extra documents that may exist between Mr. Stefani, Mayor Kilpatrick and his private attorney, and Ms. Christine Beatty and her private attorney. The City of Detroit did not participate in any such documents.
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> THE COURT: Okay.
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> MR. FINK: The question, your Honor, respectfully to her was, does she know of the existence. And she said she didn't participate in the drafting.
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> THE COURT: And she also said she was unaware. But let's specifically - - do you know of the existence of any confidential agreements involving the Mayor privately, or Christine Beatty?

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[6] Petitioner's Ex 78, pp 16 - 18.

> MS. COLBERT-OSEMUEDE: I am not aware of any confidential agreements.[7]

Petitioner's Exhibit 21 is a document entitled "settlement agreement," signed by respondent in two separate places and on behalf of two parties, "Mayor Kwame Kilpatrick" and the "City of Detroit." That settlement agreement provided for settlement of the *Brown/Nelthrope* and *Harris* cases, and that Stefani's firm would surrender all text messages for a certain period from the pager leased by the City and issued to Christine Beatty to an attorney designated by the Mayor. It further provided that the Stefani firm and the plaintiffs were bound to keep the existence and content of the texts confidential and that the City would be paid millions of dollars should there be a violation of this provision.

On January 25, 2008, Judge Colombo also signed an order requiring Mr. Stefani to be deposed regarding any and all settlement agreements in his clients' lawsuits against the city, and to produce relevant documents. That deposition occurred on January 30, 2008.

On April 4, 2008, respondent wrote to Judge Colombo:

> Dear Judge Colombo:
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> Since appearing in your courtroom on January 25, 2008, I have become aware that my statements to the Court should be supplemented and clarified.
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> As you are aware, the City of Detroit filed a brief in connection with the FOIA case filed by the Detroit Free Press. In the brief, the City maintained that the City of Detroit and its agents did not execute, participate, negotiate, possess or otherwise get involved in any additional documents related to the settlement of Brown and Nelthrope v City of Detroit and Harris v City of Detroit.
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> In addition, the Court asked questions directly of me on the record at the January 25, 2008 hearing of the Free Press Motion to Expedite.
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> I have discovered the brief and my answers did not fully reflect all of the circumstances. This letter is submitted to clarify my prior statements.

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[7] Petitioner's Ex 78, p 18 - 19.

> The responses to the Court's questions were my best recollection at the time and were truthful. However, I have subsequently been reminded of an October 17, 2007 document, that I, on behalf of the City of Detroit, did sign. I did not recall that document when participating in the drafting of the brief submitted to the Court nor did I recall it when responding to questions by the Court at the January 25th hearing.
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> My memory of the October 17, 2007 document was refreshed only when that document was produced as an exhibit during the deposition of Michael D. [sic] Stefani.
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> Subsequent to the deposition, I have made a search of and found in my electronic e-mails two items. . . .
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> Had I been aware of these items at the time, I would have suggested appropriate adjustments to the brief filed on behalf of the City of Detroit and I would have answered the questions posed differently.
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> If you have any questions, please contact [my attorney] . . .
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> Respectfully submitted,
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> Valerie A. Colbert-Osamuede
> Chief Assistant Corporation Counsel
> City of Detroit Law Department[8]

The hearing panel's report on discipline, and the Administrator's brief in support of his petition for review, appropriately focus on respondent's misrepresentations to the tribunal. The panel report states in part:

> The misconduct found in this case is of a most serious nature. As our starting point, we begin with Standard 6.1 of the American Bar Association Standards for Imposing Lawyer Sanctions and the rules relating to false statements, fraud, and misrepresent[ation] promulgated thereunder. The importance of candor toward a tribunal or any administrative agency for that matter cannot be overstated. Additionally, the duty of candor toward a client and representation free of conflict are equally important concerns.

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[8] Petitioner's Ex 92.

ABA Standard 6.1 advises that:

> Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving conduct that is prejudicial to the administration of Justice or that involves dishonesty, fraud, deceit, or misrepresentation to a court.

ABA Standard 6.11 states:

> Disbarment is generally appropriate when a lawyer, with the intent to deceive the court, makes a false statement, submits a false document, or improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding.

Comparatively, ABA Standard 6.12 states:

> Suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.

Taking into consideration the factors reflected in Standard 3.0 [primarily the respondent's mental state and the absence of actual injury caused by her misconduct] as well as the mitigating factors set forth below, the panel finds that a suspension is the appropriate discipline in this case. We make this finding for several reasons, notwithstanding the language of ABA Standard 6.12 regarding the taking of remedial action, and the respondent's attempt to remedy her statements to the court in a letter dated April 4, 2008.

As reflected in the report on misconduct, the respondent's letter to the court was dispatched nearly ten weeks after the false statements, which were addressed in Counts Three and Four of the formal complaint, were made. We also find respondent's explanation for the false statements, which is reproduced on page five of the panel's report on misconduct, fails to satisfy the quality of remedial action envisioned by Standard 6.12. Moreover, Count Five of the

> formal complaint addresses the making of a materially false statement to the Attorney Grievance Commission for which no remedial action was taken. Given the passage of time between the making of the false statements and the albeit meager attempt to remedy them, coupled with the absence of any remedial activity with regard to Count Five, we find the requirements of Standard 6.12 have been met. [HP Report on Discipline, pp 2-3.]

The panel then considered discipline imposed in other cases before a discussion of the evidence of aggravating and mitigating circumstances, some of which follows:

> We have reviewed and considered the aggravating and mitigating circumstances delineated in ABA Standard 9.0, *et seq.* Despite the serious nature of our findings of misconduct, we considered a number of factors that mitigate against imposing a lengthy suspension or disbarment. As an initial observation, we note the absence of any prior history of misconduct or discipline. From the panoply of witnesses testifying on respondent's behalf in the sanction phase of this proceeding, coupled with the absence of any prior disciplinary history, this panel is of the opinion that the misconduct found in this case is aberrant in character. There is simply no evidence on the record tending to suggest that the respondent has engaged in any similar activity professionally or privately. We are also satisfied that it is highly unlikely that similar misconduct will be committed by respondent in the future.
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> We are unswayed by the argument that the nature of the misconduct found in this case, when compared to other cases, mandates imposition of the most severe sanction, because those other cases (as this one) turn on their own individual facts. Had there been a showing that respondent personally benefitted financially or otherwise from her actions, we might have been of a mind to entertain a lengthy suspension or even disbarment. Again, had there been evidence of an improper motive of any type, this panel would have considered a lengthy suspension at the very least. . . .
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> The high-pressured nature of her employment environment, which may generate some degree of mitigation, albeit minimal, renders no excuse for the misconduct found in this case, however. . . .
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> In fashioning an appropriate disposition we are also mindful of the external, non-individualized concerns that need to be addressed. Chief among these are the need to bolster the public's confidence in the legal profession; and to promote respect for the law. In a comparable vein, the discipline imposed must also serve as a deterrent to others from committing similar misconduct. [HP Report on Discipline, pp 3-4.]

It is evident from the panel's report that it carefully undertook to serve and balance several critical goals of the attorney discipline system, such as "ensur[ing] continuity and proportionality in discipline," providing "individualized determinations based on both the nature of the misconduct as well as the respondent's particularized circumstances," "bolster[ing] the public's confidence in the legal profession," "promot[ing] respect for the law," and "deterr[ing] others from committing similar misconduct."[9]

The panel identified Standards 6.11 and 6.12 as offering the most helpful guidance from the ABA Standards in this case. The panel applied Standard 6.12 instead of Standard 6.11, in part because of its findings regarding respondent's "mental state."[10] In its report on misconduct, the panel found that, in approving the response to the Free Press's motion in which Ha, on behalf of the City, disavowed the City's involvement in "additional" settlement documents, respondent "knowingly caused a false statement of material fact to be made to a tribunal."[11] The report on misconduct does not make an express finding regarding respondent's mental state in making the false statements during the hearing before Judge Columbo, except to say that the panel was unwilling to accept respondent's explanation that she forgot about the October 17, 2007 settlement agreement. Although it is argued that the panel found intentionality by virtue of its finding in the misconduct report that the allegations of Count Four were established, it is apparent that the panel's selection of Standard 6.12 based on respondent's mental state encompasses a finding that respondent's conduct was knowing but not intentional. This panel was aware of the terms of the applicable Standards and demonstrated care in analyzing the relevant questions.

Additionally, the panel's finding of an "absence of actual injury caused by [respondent's] misconduct"[12] does not coincide with Standard 6.11's suggestion that:

> Disbarment is generally appropriate when a lawyer, with the intent to deceive the court, makes a false statement, submits a false document, or improperly withholds material information, *and causes serious or potentially serious injury to a party, or causes a significant or*

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[9] HP Report on Discipline, pp 2, 4.

[10] HP Report on Discipline, p 3.

[11] HP Report on Misconduct, p 9.

[12] HP Report on Discipline, p 3.

> *potentially significant adverse effect on the legal proceeding.* [Emphasis added.]

Once again, Standard 6.12 recommends that:

> Suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.

The panel's reliance on Standard 6.12 is premised on its findings as to respondent's mental state and of the "absence of actual injury."[13] On the other hand, Standard 6.11, with its reference to active participation in misleading a court, seems, in that respect, closer to these facts than Standard 6.12's terms which cover a lawyer's failure to take remedial action when he or she "knows that false statements or documents are being submitted to the court or that material information is improperly being withheld."

Of course, the Standards "do not provide rigid guidelines for a level of discipline to be imposed in every conceivable factual situation." *Grievance Administrator v Harvey J. Zamek*, 98-114-GA; 93-133-FA (ADB 1999). They are "not designed to propose a specific sanction for each of the myriad of fact patterns in cases of lawyer misconduct." ABA Standards, p 6. Nonetheless, under *Grievance Administrator v Lopatin*, 462 Mich 235; 612 NW2d 120 (2000), they are the starting point for the discharge of "our responsibility on review . . . to examine the factors affecting the assessment of the appropriate level of discipline in light of the ABA Standards and applicable Michigan precedents and attempt to ensure continuity and proportionality in discipline." *Grievance Administrator v Kathy Lynn Henry*, 09-107-JC (ADB 2010).

Also,

> [*Lopatin's*] directive to follow the ABA standards is not an instruction to [the ADB or its panels to] abdicate their responsibility to exercise independent judgment. Where, for articulated reasons, the

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[13] The panel's finding of "absence of actual injury" does not, of course, mean that Standard 6.12 does not apply. At the very least, we must conclude from the panel's selection of Standard 6.12 as most apt that it found *potential* injury to a party or an adverse effect on the FOIA proceeding. And the panel was no doubt aware that respondent's participation in stonewalling the Free Press caused some injury, even if, as respondent and Ms. Ha testified, the language in the City's brief, denying involvement in collateral agreements, was initially drafted by respondent's supervisor, the Corporation Counsel.

> ADB or a hearing panel determines that the ABA standards do not adequately consider the effects of certain misconduct, do not accurately address the aggravating or mitigating circumstances of a particular case, or do not comport with the precedent of this Court or the ADB, it is incumbent on the ADB or the hearing panel to arrive at, and explain the basis for, a sanction or result that reflects this conclusion. [*Lopatin*, 462 Mich at 248 n 13.]

In this matter, precedent affords some guidance in addition to the panel's application of the Standards. The Administrator, arguing for disbarment of the respondent, cites our recent decision in *Grievance Administrator v Karen Plants*, 11-27-AI; 11-55-JC (ADB 2012), for the propositions that Standard 6.1 articulates the presumptive sanction of disbarment for lawyers who submit false evidence to a tribunal and that public lawyers should be held to a high standard. Respondent, however, cites various cases in which knowing misrepresentations to tribunals have resulted in suspensions of less than 180 days (thus, not requiring reinstatement proceedings pursuant to MCR 9.123(B)), or even a reprimand. See, e.g., *Grievance Administrator v George T. Krupp*, 96-287-GA (ADB 2002) (affirming 90-day suspension for violation of MRPC 3.3(a)(1) under ABA Standard 6.12 for respondent's knowingly false assertion in open court, relied upon by judge in ruling, that a physician had written a letter when, in fact, respondent's client had authored it and she had informed respondent of this).

Respondent also argues that the hearing panel's imposition of a 179 day suspension in *Grievance Administrator v Samuel E. McCargo*, 09-50-GA (HP 9/10/2010), is instructive.[14] There, the respondent, who also represented Kwame Kilpatrick in the *Brown/Nelthrope* litigation, was found to have violated MRPC 3.3(a) by failing to take reasonable remedial measures when he came to know of the falsity of testimony he offered (through Kilpatrick and Christine Beatty) during the *Brown/Nelthrope* trial. The panel in that case "conclude[d] that ABA Standards 6.11 and 6.12 appl[ied] to [Mr. McCargo's] conduct," but that "Standard 6.12 more closely reflect[ed] McCargo's conduct." *Id.*, pp 5-6. While there may be some similarities and overlap between *McCargo*, and the instant case, there are obvious differences. The gravamen of the conduct in *McCargo* was that, by reviewing the text messages or lengthy quotes therefrom contained in a draft brief by Stefani, Mr. McCargo knew that false testimony had been offered during the *Brown/Nelthrope* trial and he failed to remedy this. The critical finding by the panel in this case is that respondent knowingly made a

[14] No petition for review of the panel decision was filed in that case.

false statement to a tribunal in the FOIA litigation about the existence or nonexistence of settlement documents resolving *Brown/Nelthrope* and *Harris*. Other comparisons regarding the treatment of mitigating evidence (such as testimony from many witnesses about the professional ethics and character of the respective respondents and the aberrational nature of their misconduct) do not assist us in deciding the appropriate result here. In sum, one key distinction between *McCargo* and this case is that respondent made an affirmative misrepresentation to a tribunal.

In recent years this Board has decided several cases involving lawyers found to have knowingly made false statements of fact. See, *Grievance Administrator v Kathy Lynn Henry*, *supra* (imposing a suspension of one year and collecting similar decisions). While these recent cases involved various findings of misconduct leading to a suspension of one year, the Court and this Board have often observed 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).

In this case, as the panel alluded to, respondent may have been under pressure from the Corporation Counsel, and ultimately the Mayor, to deny the existence of, or City involvement with, other settlement documents even as their existence was plainly coming to light. However, her response to such pressure was unacceptable. And, while she may not have been the only one to allow Ms. Ha to unwittingly make a false statement of fact in writing to a court, she failed to prevent it when she could have. The next day, when she was called upon to answer a direct question (or two) by Judge Colombo, she did not act in a manner consistent with her reputation and record for candor, even though she had been afforded more time to reflect than some attorneys who have foolishly lied when put on the spot and may have received discipline of less than 180 days.

While we have great respect for the panel hearing this matter and its judgment based on all of the appropriate factors, including factors particular to this respondent and those with a broader scope, such as deterrence, we are of the opinion that respondent's knowing misrepresentations to the court were so at odds with her role and duties as an officer of the court that a suspension of 90 days is insufficient to achieve the aims of the discipline system. The purposes of attorney discipline include protection of the public respondent was obligated to serve, protection of the courts which rely on candor from attorneys in order to function fairly and efficiently, and protection of the legal

profession, whose members must aid in the administration of justice. To advance these aims, and in accordance with previous decisions, we conclude that respondent should be suspended from the practice of law in Michigan for a period of 18 months.

Board members Thomas G. Kienbaum, James M. Cameron, Jr., Rosalind E. Griffin, M.D., Andrea L. Solak, Carl E. Ver Beek, Craig H. Lubben, Lawrence G. Campbell, and Dulce M. Fuller concur in this decision.

Board member Sylvia P. Whitmer, Ph. D., was absent and did not participate.