STATE OF MICHIGAN

Attorney Discipline Board

GRIEVANCE ADMINISTRATOR,
Attorney Grievance Commission,

Petitioner/Appellee,

v

Case Nos. 10-25-AI; 10-39-JC

PETER W. MACUGA, II, P 28114,

Respondent/Appellant.
_____/

ORDER AFFIRMING HEARING PANEL
ORDER OF REPRIMAND WITH CONDITIONS

Issued by the Attorney Discipline Board
211 W. Fort St., Ste. 1410, Detroit, MI

The Grievance Administrator petitioned for review of an Order of Reprimand with Conditions issued in this matter by Tri-County Hearing Panel #9 on July 21, 2011. The Attorney Discipline Board has conducted review proceedings in accordance with MCR 9.118, including a review of the record before the panel and the briefs and arguments submitted by the parties at the review hearing conducted on November 9, 2011. For the reasons stated below, the Board has concluded that the hearing panel's order should be affirmed.

On February 22, 2010, respondent, Peter W. Macuga, II, was convicted of the offense of operating under the influence of alcohol, third offense, a felony. Respondent's sentence in the Wayne County Circuit Court included probation for a period of 24 months. On March 4, 2010, the Grievance Administrator and respondent filed a stipulation to set aside respondent's automatic interim suspension under MCR 9.120(B)(1), noting among other things, respondent's total abstinence from alcohol since June 2008, his consistent attendance and participation in Alcoholics Anonymous (AA) and his entry into a monitoring agreement with the Lawyers and Judges Assistance Program (LJAP) of the State Bar of Michigan. The parties stipulated that an order setting aside the automatic interim suspension should be subject to conditions including continued abstinence, continued participation with AA and entry into a monitoring agreement with LJAP. The order of the Board's chairperson accepting that stipulation and setting aside respondent's automatic suspension was issued March 5, 2010.

In its order issued July 21, 2011, Tri-County Hearing Panel #9 ordered that respondent should be reprimanded, coupled with a further order that respondent be subject to certain conditions for a period of three years, including abstinence from alcohol and non-prescription controlled substances; continued participation in a monitoring agreement with LJAP (including

random screenings and reporting in the event of non-compliance); and continued participation with AA. The panel specifically ordered that a material breach by respondent of any of the conditions would result in the filing of a petition for an order directing respondent to appear before Tri-County Hearing Panel #9 to show cause why discipline should not be substantially increased.

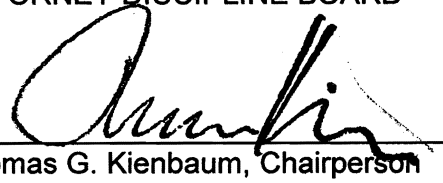
The Attorney Discipline Board has considered the arguments submitted by the Grievance Administrator, who requests that the Board vacate the hearing panel's order of reprimand with conditions for a period of three years and enter an order suspending respondent's license to practice law in Michigan for 180 days with conditions for a period of two years.

These arguments were ably presented to the hearing panel below in oral arguments and in the Grievance Administrator's sanction brief filed with the panel. The Board is persuaded that the hearing panel carefully considered the arguments for and against the entry of a suspension order in this case, as evidenced by the hearing panel's thoughtful and well reasoned report filed July 21, 2011. (Report attached as an appendix.) Based upon our review, we conclude that the sanction imposed by the hearing panel in this case is appropriate under all of the facts and circumstances presented and we are not persuaded that the panel's decision should be overruled.

NOW THEREFORE,

IT IS ORDERED that the order of reprimand with conditions issued by Tri-County Hearing Panel #9 on July 21, 2011, is **AFFIRMED**.

ATTORNEY DISCIPLINE BOARD

By: 

Thomas G. Kienbaum, Chairperson

DATED: December 19, 2011

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

STATE OF MICHIGAN

Attorney Discipline Board

GRIEVANCE ADMINISTRATOR,
Attorney Grievance Commission,

Petitioner,

v

Case Nos. 10-25-AI; 10-39-JC

PETER W. MACUGA, II, P 28114,

Respondent.
_____/

REPORT OF TRI-COUNTY HEARING PANEL #9

PANEL MEMBERS: Michael J. Watza, Chairperson
A. David Baumhart, III, Member
Robert L. Willis, Jr., Member

APPEARANCES: Cynthia C. Bullington, Assistant Deputy Administrator
for the Petitioner

Kenneth M. Mogill,
for the Respondent

I. EXHIBITS

Please see Index to Exhibits on page 2 of the December 1, 2010, hearing transcript and page 2 of the February 15, 2011, hearing transcript.

II. WITNESSES

December 1, 2010 Hearing	February 15, 2011 Hearing
Linda Harms	Hon. Kathleen MacDonald
Peter W. Macuga, II, Respondent	Amos Williams

APPENDIX

III. PANEL PROCEEDINGS

Respondent, Peter W. Macuga, II, was convicted in the Wayne County Circuit Court of the felony offense of operating a motor vehicle under the influence of intoxicating liquor, 3rd offense. Under MCR 9.120(B)(1), an attorney convicted of a felony in Michigan is automatically suspended from the practice of law on an interim basis. However, MCR 9.120(B)(1) further provides that the Attorney Discipline Board may, on the attorney's motion, set aside such an automatic suspension when it "appears consistent with the maintenance of the integrity and honor of the profession, the protection of the public and the interests of justice." On March 4, 2010, respondent and the Grievance Administrator, by their respective counsel, filed a stipulation with the Attorney Discipline Board agreeing that setting aside the automatic interim suspension in Mr. Macuga's case would be appropriate. The parties listed seven agreed upon factors in favor of such an exception to the automatic suspension rule and the parties further agreed that respondent would be subject to certain conditions. In accordance with that stipulation, the Attorney Discipline Board entered an order on March 5, 2010, setting aside respondent's automatic interim suspension. The order was entered *nunc pro tunc* to February 22, 2010.

On April 6, 2010, the Grievance Administrator filed a certified copy of respondent's conviction, thereby triggering the show cause procedure provided in MCR 9.120(B)(3). A hearing date was originally scheduled for June 1, 2010. That hearing was adjourned at the request of respondent and the rescheduled hearing on June 21, 2010, was adjourned by stipulation of the parties. An additional adjournment was granted by the panel, without objection by the Grievance Administrator, in light of medical treatment undertaken by respondent's counsel. The panel convened for a public hearing under MCR 9.120(B)(3) on December 1, 2010.

At the outset of that hearing, it was agreed by all parties that the fact of respondent's conviction was not contested, nor was it contested that MCR 9.104(5) defines conduct that violates a criminal law of a state as misconduct and grounds for discipline. Following opening statements by counsel, the respondent called his first witness, **Linda Harms**, who is employed as a case monitor for the Lawyers and Judges Assistance Program (LJAP) at the State Bar of Michigan. Ms. Harms' educational and professional credentials were established. (12/01/10 Tr, pp 20-21.) Ms. Harms' evaluation of the respondent in March 2010 is set forth in her testimony in the transcript which is part of the record of this case. The panel notes here that Ms. Harms testified to her diagnostic impression that respondent had a diagnosis from DSM-IV of 303.90, alcohol dependence in full sustained remission, and 295.35, major depressive disorder, recurrent, and in partial remission. (12/01/10 Tr, pp 23-24.) Ms. Harms also testified as to her recommendations that respondent remain abstinent from alcohol and other non-prescribed mind and mood altering substances; that he participate in random screening for alcohol and other drug use; that he attend a minimum of three AA meetings weekly, with one meeting specifically for attorneys; that he continue treatment with Dr. Howard Belkin; and that he might benefit from participation in a monitoring contract under the auspices of the Lawyers and Judges Assistance Program.

Ms. Harms stated that respondent was meeting with Lee Young, an LJAP therapist and facilitator, on a monthly basis and that the monitoring report for November 2010 showed that respondent was in full compliance with the terms of his LJAP monitoring contract. Ms. Harms testified that her prognosis for respondent was "good" with appropriate treatment, education and support and she testified that respondent has "gone above and beyond" his recommended program. In answer to an additional question, Ms. Harms testified that her prognosis for respondent is "very good" (12/01/10 Tr, p 32), that he appeared to her to be very committed and that he has been sober for approximately 2½ years.

Respondent, **Peter W. Macuga, II**, testified on his own behalf. Again, respondent's testimony is in the transcript which is part of the official record in this case. Very briefly summarized, respondent provided some personal background including his military service; his cum laude graduation from Detroit College of Law in 1977; and his admission to the Bar that same year. Respondent was employed by the City of Detroit Law Department from 1977 to 1990. He then went into private practice and he now concentrates on environmental class action litigation. Respondent has been an adjunct professor at Detroit College of Law [Michigan State University School of Law] since 1984. Respondent testified to the panel that he is an alcoholic. He recounted his increased drinking from the time he became a lawyer. He specifically related his excessive drinking to depression and anxiety, two conditions for which he has sought professional treatment.

Respondent related that he had two drinking-related driving tickets in Grosse Pointe Park in approximately 1988 and 1990. He received a third alcohol related ticket in Harper Woods in 2004, although he was apparently not convicted of drunk driving for that incident. He testified that his drinking increased in the 2000's until June 28, 2008, the date of his arrest in Detroit in the underlying matter. Respondent testified that he is now active in AA and has not had a drink since June 28, 2008.

At the time of his arrest in Detroit in June 2008, respondent had already begun treating for depression with Dr. Belkin. One week after his arrest, he began attending an AA group for an early morning meeting Monday through Saturday. In November 2008, respondent began an intensive five week outpatient program at Brighton Hospital, which he completed.

Respondent testified that he remains under the weekly care of Dr. Howard Belkin, M.D., and attends AA on a daily basis. He testified that, under the direction of Dr. Belkin, he has gained control of his depression and anxiety.

Respondent testified that in addition to his attendance at AA, the Wayne County Circuit Court imposed, as a condition of his bond, the requirement that he wear an alcohol monitor on his ankle. He testified that during the 19 months he wore the monitor, he never had a positive alcohol reading.

Respondent was extensively cross-examined by counsel for the Grievance Administrator on a number of points surrounding his arrest in Detroit, such as the circumstances of the arrest, the nature of any verbal exchange between respondent and the arresting officers, etc. Respondent was unable to recall the details of some parts of that event. Respondent testified that he was found guilty after a two day bench trial and that he reported for a mandatory 30 day jail sentence, but was sent home with a device designed to detect the presence of alcohol on his breath at random intervals. Respondent could not recall the details of any counseling after his first drunk driving offense in 1988, but testified that he attended AA meetings for about five months after his 2004 arrest in Harper Woods. Finally, respondent was questioned, under cross-examination and on re-direct, regarding various lawsuits in which respondent or members of his firm have filed appearances since the stipulated order of the Attorney Discipline Board setting aside his automatic suspension.

The proceeding in this matter was continued before the panel on February 15, 2011. At that time, respondent presented two character witnesses, attorney **Amos Williams** and Wayne County Circuit Judge **Kathleen MacDonald**. Mr. Williams' testimony appears at pages 4-13 of the February 15, 2011 transcript. Judge MacDonald's testimony appears at pages 13-20.

The Grievance Administrator's counsel urged the imposition of an order suspending respondent's license for 180 days, citing ABA Standard 5.12 and prior orders of hearing panels and the Attorney Discipline Board. Respondent's counsel argued for the entry of an order of reprimand with conditions or an order of probation with conditions to include continued compliance with his monitoring agreement with the Lawyer's and Judges Assistance Program.

At the conclusion of the hearing, the panel dealt with two additional matters. First, the panel ruled that it would not accept a proffered brief on sanctions from respondent's counsel. The panel also considered the request from the Administrator's counsel that the panel disregard arguments with respect to the earlier stipulation of the parties setting aside respondent's interim suspension. However, the panel did not rule on that request in light of Ms. Bullington's willingness to move on with her closing argument.

IV. FINDINGS AND CONCLUSIONS REGARDING MISCONDUCT

Under the applicable provisions of MCR 9.120 and MCR 9.104(5), respondent's February 22, 2010 conviction of OWI 3rd, a felony, in Wayne County Circuit Court, constituted professional misconduct and grounds for discipline.

V. REPORT ON DISCIPLINE

This panel does not believe its function is to punish. Our function is to protect the public, as well as the courts and the legal profession, from attorneys who, for whatever reason, are incompetent, dishonest or otherwise not fit to serve. Mr. Macuga, because of an apparent addiction to alcohol, has stumbled in his personal life several times. Such is, regrettably, not a unique circumstance to those engaged in the practice of law. However, here we are presented by an ongoing successful rehabilitation. Such is not as common as we would hope. Mr. Macuga has, by all appearances, including independent evaluation by the Bar and their alcohol treatment experts, adopted a serious and concerted approach to his problem and is actively engaged in treating it. It further appears that treatment is proving successful. No facts to the contrary have been presented. We would not wish to now impose a punishment or other modification that might trigger a change in what appears to be a successful process of supervised rehabilitation. We believe it best to leave management of this issue to the professionals who appear to have it well in hand.

Another critical factor considered here is what is entirely absent from the record of this case - not a single client complaint, nor any evidence of malfeasance or nonfeasance in what clearly has been a very successful practice of law, which includes service to the public in large and complex class actions on many consumer issues. The prosecution itself acknowledges this by its stipulation to waive the automatic suspension in this case, specifically noting the important work Mr. Macuga does on behalf of the public.

Finally, we believe that it is especially important in this case to recognize the distinct roles for the criminal justice system and the lawyer discipline system when an attorney has violated a criminal statute. By operating a motor vehicle with a high blood-alcohol level, respondent not only violated a criminal statute but, as pointed out by the Grievance Administrator's counsel, presented a danger to other motorists and pedestrians. The function of the criminal justice system is to deal

with such infractions and it appears that the Wayne County Circuit Court has taken appropriate actions in respondent's case. Furthermore, another drinking and driving conviction will surely result in even harsher sanctions. It does not necessarily follow, however, that the attorney discipline system must now impose a further punishment by taking away respondent's livelihood for the six month period suggested by the Grievance Administrator.

This line between criminal conduct and professional conduct is clearly recognized in our Supreme Court's comment to MRPC 8.4, which includes these observations:

> Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of wilful failure to file and income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice.

The panel is aware of its obligation to apply the American Bar Association's Standards for Imposing Lawyer Sanctions and, indeed, counsel for both parties referred to the Standards during their closing arguments. It must be said that ABA Standard 5.1 is not particularly helpful, in our view, in a case involving drunk driving convictions resulting primarily from the lawyer's addiction to alcohol. Disbarment under ABA Standard 5.11 is reserved for serious crimes or serious intentional conduct involving dishonesty and fraud. Standard 5.13, recommending reprimand, does not mention criminal convictions at all. Clearly, neither Standard 5.11 or Standard 5.13 is appropriate in this case. By default, the panel must apparently look to ABA Standard 5.12, as suggested by the Administrator's counsel. That Standard states:

> 5.12 Suspension is generally appropriate when a lawyer knowingly engages in criminal conduct which does not contain the elements listed in Standard 5.11 and that seriously adversely reflects on the lawyer's fitness to practice. (Emphasis added.)

As we observed above, respondent has been convicted of three drunk driving offenses, albeit with a gap of 18 years between his second conviction in 1990 and the third conviction in 2008. We would not dispute that these convictions seriously adversely reflect on respondent's fitness as a licensed driver. He has suffered the consequences meted out by the criminal justice system. We are less persuaded, however, that drunk driving convictions substantially related to the disease of alcoholism are necessarily to be equated with "offenses involving violence, dishonesty, or breach of trust, or serious interference with the administration of justice" as discussed in the commentary to ABA Standard 5.12.

In any event, an analysis under the ABA Standards does not end with the identification of the proper Standard - there must then be consideration of aggravating or mitigating factors of the type described in ABA Standard 9.0. With the possible exception of a pattern of misconduct (respondent's two prior convictions), under Standard 9.22(c), the panel does not find that any other aggravating factors in Standard 9.22 are applicable in this case. (While we acknowledge that

respondent has "substantial experience in the practice of law," we do not think that factor carries much weight with regard to respondent's private conduct.) By contrast, the following mitigating factors should be given substantial weight:

1. Absence of a prior disciplinary record [Standard 9.32(a)];
2. Personal or emotional problems [Standard 9.32(c)];
3. A cooperative attitude during the discipline proceedings [Standard 9.32(e)];
4. Imposition of other penalties or sanctions [Standard 9.32(k)];
5. Remorse [Standard 9.32(l)]; and
6. Remoteness of prior offenses [Standard 9.32(m)].

Finally, we believe that the unrebutted evidence in this case clearly establishes the mitigating factor described in ABA Standard 9.32(i) as: mental disability or chemical dependency including alcoholism, where there is medical evidence that the respondent is affected by the dependency; the dependency caused the misconduct; the respondent's recovery from the dependency is demonstrated by a meaningful and sustained period of successful rehabilitation; and the recovery arrested the misconduct and recurrence of that misconduct is unlikely.

Accordingly, we are convinced that respondent poses no threat to the public, the legal profession or the courts in Michigan by virtue of his managed addiction and that a suspension now, three years after his drunk driving conviction, would serve no meaningful purpose in protecting the public. However, we do believe that continued professional rehabilitation support is appropriate and necessary. Furthermore, a disciplinary response to the conviction giving rise to this proceeding is clearly appropriate.

To that end, it is the judgment of this panel that respondent be reprimanded and that he be subject to conditions related to his misconduct pursuant to MCR 9.106(3) for a period of three years. Specifically, for a period of three years from the entry of this panel's report and order, respondent shall be required to continue testing and monitoring under the direction of the State Bar of Michigan's Lawyers and Judges Assistance Program. Respondent shall also not consume alcohol or non-prescription controlled substances during this time period. During the period of respondent's probationary conditions, he shall continue to attend meetings of Alcoholics Anonymous (AA) at least three times per week and submit quarterly reports to the Grievance Administrator, verifying his continued participation. On request of either party, the frequency of respondent's AA attendance may be reviewed by the panel on an annual basis. Respondent shall continue under the weekly care of Howard Belkin, M.D. and provide quarterly reports to the Grievance Administrator, verifying his compliance. A material breach by respondent of these conditions, during this period, may result in the filing by the Grievance Administrator of a petition for an order directing respondent to appear before this panel to show cause why discipline should not be substantially increased.

Respondent, since March 4, 2010, has been the subject of a stipulation by the parties allowing him to continue to engage in the practice of law, but barring him from taking new cases. On the effective date of this order, the stipulated order of March 4, 2010, will be automatically terminated and the restriction on accepting new cases is to be lifted. Costs assessed under MCR 9.128 are to be paid by respondent within 30 days of the date of the hearing panel's order.

VI. CONCURRING OPINION OF HEARING PANELIST ROBERT L. WILLIS, JR.

While it was, and is, my considered opinion that a 60 day suspension plus a two year probationary period would provide both a protection to the legal community and a disincentive to further drinking by respondent, I concur in this unanimous decision of the hearing panel. However, I offer these further comments to impress upon respondent my concerns and to suggest that a reappearance before this panel is likely to have serious disciplinary consequences.

I am as favorably impressed by respondent's competence as an attorney as I am negatively impressed by the behavior that led to this felony conviction for OWI. I am also favorably impressed by respondent's commitment to sobriety since his last arrest for drunk driving in 2008, but the potential pitfall for a return to drinking is quite evident. For example, respondent had a misdemeanor ticket for an alcohol-related driving incident and successfully completed probation in 2005; three years later he was, again, convicted of OWI, a felony, after having been arrested with a blood alcohol count of .21.

With four alcohol-related arrests, respondent acknowledges that alcohol was a part of his daily existence and that alcohol flowed even more freely after his legal victories. The story of the pain of his addiction and the extraordinary efforts to cure it were well received by this writer. However, part of that story, the part about clinical depression, is not complete. He cannot now, nor can he ever, state that he will no longer be clinically depressed nor will he, as he has testified, feel as worthy as he actually is. He must however, continue to treat his condition and this writer hopes that it is treated successfully. Unfortunately, this condition makes sobriety even more difficult.

This writer acknowledges the Grievance Administrator's reliance upon Standard 5.12 of the American Bar Association's Standards for Imposing Lawyer Sanctions. A felony conviction by definition is a serious crime that aversely reflects on the lawyer's fitness to practice. This felony conviction was the end result of a "pattern of repeated offenses" of admitted alcohol related driving that dates back to his 1988 conviction with additional testimony of social drinking that acknowledges alcohol consumption at social events dating back to the 1960's.

In spite of this felony conviction and respondent's long history of felonious drinking and driving, respondent has suffered relatively few serious criminal or disciplinary consequences. After the 2008 felony conviction for drunk driving, respondent was ordered to spend time in jail. However, the jail was full and respondent did not have to go. Respondent was temporarily suspended from his practice by the Attorney Discipline Board, but that suspension was also waived. The only consequence realized by respondent to date, other than the costs for representation, is the possibility of the Attorney Discipline Board imposing sanctions. It is during this period of time, that the possibility of sanctions hangs over respondent's head that respondent remained sober. Will he remain sober when the possibilities of sanctions are removed?

After much deliberation, I join my colleagues in our decision to impose a reprimand with conditions which will remain in place for three years. I am convinced that if respondent scrupulously adheres to the those conditions, the public will be adequately protected and we will have achieved the primary goal of these proceedings. If, however, respondent is unable or unwilling to comply, then it is also clear to me that more serious disciplinary consequences must follow. The choice is now up to respondent.

VII. SUMMARY OF PRIOR MISCONDUCT

None.

VIII. ITEMIZATION OF COSTS [MCR 9.128 - As Amended July 29, 2002]

Attorney Grievance Commission:	
(See Itemized Statement filed 06/13/11)	$ 33.42
Attorney Discipline Board:	
Hearing held 12/01/10	$ 541.50
Hearing held 02/15/11	$ 327.50
Administrative Fee	$1,500.00
TOTAL:	**$2,402.42**

ATTORNEY DISCIPLINE BOARD
Tri-County Hearing Panel #9

By: Michael J. Watza w/permission Amp
Michael J. Watza, Chairperson

DATED: July 21, 2011