STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellant,

v

Karen K. Plants, P 43616,

Respondent/Appellee,

Case Nos. 11-27-AI; 11-55-JC

Decided: March 20, 2012

Appearances:

Patrick K. McGlinn, for the Grievance Administrator/Appellant
Kenneth M. Mogill, for the Respondent/Appellee

BOARD OPINION

This attorney discipline case arises out of respondent's conviction for misconduct in office. MCL 750.505. The factual basis for respondent's guilty plea before Wayne Circuit Judge Timothy M. Kenney was that:

> During the pendency of People versus Alexander Aceval and Ricardo Pena Ms. Plants was the assistant prosecutor in charge of that litigation, and between March of 2005 and September of 2005 she presented Mr. Chad Povish as a witness and did not disclose to the defense that he was receiving a renumeration [sic, remuneration] as a paid confidential informant.[1]

The April 13, 2011 judgment of sentence was filed with the Attorney Discipline Board on April 27, 2011, and the matter was assigned to a hearing panel in accordance with MCR 9.120(B). Pursuant to that rule and *Grievance Administrator v Deutch*, 455 Mich 149; 565 NW2d 369 (1997), a hearing was conducted at which the panel heard evidence regarding the circumstances of the criminal conduct and the appropriate level of discipline. In addition to documentary evidence, the record below contains testimony from respondent, two law enforcement officers who had worked

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[1] Petitioner's Exhibit 6 ("P's Ex"), at p 7.

with her over the years and attested to her dedication and professionalism as a prosecutor, and two persons who know her through her volunteer activities and who testified as to her character and good works. The hearing panel found "that the respondent . . . committed misconduct in office by knowingly allowing false testimony to be given during a trial and by making misleading arguments to a jury" and imposed a suspension of two years, ordering that the suspension would be effective as of the date of her March 2, 2011 guilty plea. The Grievance Administrator has petitioned for review, arguing that disbarment is the appropriate sanction. We agree.

I. Factual Background & Conduct of Respondent Leading to Her Conviction.

In a discipline proceeding commenced by the filing of a judgment of conviction under MCR 9.120, hearing panels have the "critical responsibility to carefully inquire into the specific facts of each case." *Deutch*, 455 Mich at 169. In the hearing below, respondent testified as to the incidents that led to her conviction, and various transcripts and other exhibits were admitted.

In this section of the opinion, we set forth a summary of the facts. A more complete statement of facts (including additional quotations from, and citations to, the record) is set forth below and constitutes an integral part of this Board's opinion in this matter.

Respondent handled a prosecution against two men (Alexander Aceval and Ricardo Pena) charged with conspiring to deliver 47 kilograms of pure cocaine picked up from Aceval's bar (J Dub's). Respondent was involved early in the case. After the arrest of Aceval and Pena, she approved, by telephone, a warrant for the search of Aceval's home. The warrant relied on an unnamed source and recited that "two unknown white males exited [a] vehicle and entered [J Dub's]." Other references to one or more "unknown white males" were contained in the warrant/affidavit. In fact, the two males, Chad Povish and Bryan Hill, were not unknown to the police. Povish was the confidential informant who led the police to Aceval. Hill was Povish's friend who worked at J Dub's. Hill did not have a valid driver's license, so he asked Povish if he wanted to do "some work" for Aceval. At some point prior to the transaction, Povish informed the police.

On March 11, 2005, Povish drove to J Dub's, went to a store to purchase duffel bags at Aceval's direction, and left the parking lot with the 47 kilos of cocaine in his trunk. Aceval followed in his truck with a phone for the purpose of directing Povish (Povish had been supplied with a phone by Aceval). The police, aware that the transaction was to take place, were in the vicinity. The

officer in charge, Robert McArthur, was in telephone contact with Povish during the transportation of the drugs.

Povish and Hill were ostensibly arrested and put through the booking process. Two days later, respondent was working on the case and called Officer McArthur, to find out why their names were not among those being charged as co-conspirators. It was then that she learned that Povish was the confidential informant and neither he nor Hill were to be charged with crimes. Respondent and McArthur had decided at this point that Povish would testify in the case.

At the March 24, 2005 preliminary examination, Inkster Police Sergeant Scott Rechtzigel, who was present at the arrests, took the stand and testified that after Aceval arrived at the bar, another car drove up and, "There [were] two white male occupants, later identified. One was a Chad Povish" (emphasis added). At other times during the preliminary exam, Sergeant Rechtzigel repeated his characterization of Chad Povish and Bryan Hill as unknown to the police until they were "later identified." Also, Povish testified that he drove his car to the bar "[t]o do some work" that Bryan Hill asked him to do, and that he did not know what was in the duffel bags or that the "work" would be illegal. These statements were untrue and known to respondent to be untrue. In response to defense counsel's questioning about events after being taken to the police station, Povish also testified that he was "worried." On further questioning it was established that he was released and had not been charged with a crime as of the date of the preliminary examination.

At the conclusion of the preliminary exam, the parties argued their positions and the question of the reasonableness of the officer's suspicion to stop the cars became an issue. During an evidentiary hearing on that question, Sergeant Rechtzigel testified that the police had used the confidential informant several times in other cases and that the informant was being paid.

Respondent did not counsel her witnesses to testify truthfully prior to the preliminary exam, nor did she attempt to take a break in the proceedings to remonstrate with her witnesses or pursue other action to correct the record or remedy the perjury at or after the preliminary examination. And she did not tell the officers that such false testimony could not be repeated in future proceedings.

The case progressed and the trial judge, Wayne Circuit Judge Mary M. Waterstone, learned that Povish was the confidential informant at a pretrial hearing. Also, by that point, respondent had learned that Povish's compensation for his role would be a percentage of the forfeiture proceeds.

The submission of false testimony continued during the pretrial stage of the case. At another pretrial hearing, on September 8, 2005, shortly before trial commenced, Sergeant Rechtzigel testified that he had never met Povish before March 11, 2005 (the date of the drug bust). Respondent testified before the hearing panel below as follows:

> That was a lie. He had met Chad Povish in his capacity as a confidential informant ["CI"] for the Inkster Police Department. I didn't say anything at the time. I knew it was a lie.
>
> I went up to my office, I consulted with my supervisor, Nancy Diehl. She indicated she had never encountered a problem like that, go talk to Tim Baughman and talk -- who was head of our appellate bureau at the time, or appellate department.
>
> I talked to him and, based on his advice, I contacted the judge and asked her if we could do an *ex parte* sealed record, I wanted to make a record of the fact that Sergeant Rechtzigel had committed perjury.
>
> Q. And did you do that?
>
> A. Yes.

That day, September 8, 2005, respondent had an *ex parte* conference with the judge, which was transcribed by a court reporter,[2] in which she made the following statement to the judge:

> MS. PLANTS: We were doing an evidentiary hearing on Tuesday concerning Mr. Pena and, with Mr. Feinberg's prompting, Mr. Scharg asked the witness, Sergeant Rechtzigel, whether he had met Chad Povish, Brian Hill [sic] or the defendant prior to March 11th, 2005. Sergeant Rechtzigel said no. This clearly contradicts earlier testimony he gave about the CI which [sic] he had met.
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> He knowingly committed perjury to protect the identification of the CI. To answer yes would have indicated that he had met them in a confidential informant capacity.
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> I did not object at that point because I thought an objection would telegraph who the CI is. I let the perjury happen. He committed perjury knowingly, all in efforts to comply with the Court's order to keep the CI confidential. [Emphasis added.]

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[2] Respondent's Exhibit A.

Respondent had also informed the judge that the defendants had narrowed the identity of the confidential informant to Povish or Hill. The judge added that she thought the CI was "in grave danger" and was "very concerned about his identity being found out."

Although respondent testified that her actions in conducting the *ex parte* conference with the judge were consistent with the advice she received, she also testified that, "[Mr. Baughman's] first advice was to hold a hearing with the defense attorneys and the judge," and that she did not inform her colleagues about the false search warrant, or the perjury at the preliminary exam. Nor is there any indication in the record that additional advice was sought as the perjury continued during trial.

On the eve of trial, respondent did not tell her witnesses to tell the truth. Instead, she "had a conversation in the witness room with the Inkster police officers [about how to handle defense questions about the identity of the CI, or the role of Povish], indicating to them that I had spoken to somebody in our Appellate Bureau and that, you know, we were going to try and keep the record clean by me objecting. If something did come out, I would make a sealed record."

Trial commenced on September 13, 2005, and respondent asked Sergeant Rechtzigel about Povish's car driving up to the bar:

> Q. Then did you come to find out later who the driver was?
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> A. Yes.
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> Q. And who was that?
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> A. Later identified as Chad Povish.
>
> Q. And the passenger?
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> A. It was a Bryan Hill. [Emphasis added.]

The testimony respondent had characterized to the judge as "perjury" was thus repeated, this time to a trier of fact. Furthermore, respondent elicited this testimony with questions containing the false predicate, i.e., by asking not only "who was the driver," but, "did you come to find out later who the driver was?"

The September 15, 2005 trial transcript was also admitted into evidence. It reveals false testimony by Povish, misleading statements by respondent, and immediate (and usually successful) objections almost every time defense counsel got close to learning information that would reveal

Povish to be a paid informant. Outside the presence of the juries, the parties addressed certain matters with the judge. Povish, who was about to testify, was given immunity at the insistence of defense counsel; respondent protested that there were no deals, but it was not necessary. In the course of this colloquy, defense counsel brought up the fact that perjury by Povish would not be covered by the grant of immunity and respondent replied: "That goes without saying."

A summary of various portions of the trial proceedings on September 15, 2005, is set forth in the Statement of Facts below which is, as we have noted above, part of this opinion. In brief and in part, the trial proceedings on September 15, 2005, include:

- Respondent's statements to defense counsel that Povish had no "deals" before his testimony at trial (for which he was given immunity at the insistence of defense counsel);

- False testimony by Povish that he had not met Rechtzigel or McArthur before March 11, 2005, when in fact he had been a confidential informant on this and other cases before then;

- False testimony by Povish about his employment and sources of income (i.e., excluding his income as an informant on *Aceval/Pena* and other cases);

- False testimony by Povish that he had no "deal" with the police or prosecution before he began to testify;

- False testimony by Povish about why the police did not charge him along with Aceval and Pena for possession of 47 kilos of cocaine, what the police said when they let him go, whether he was worried about being prosecuted, and why he did not hire an attorney.[3]

On September 19, 2005, Officer McArthur falsely testified regarding his knowledge as to where the cocaine was headed as Povish drove with it away from the bar.

Closing arguments were then given to the *Pena* jury. Respondent represented to the jury that Povish was a dummy "who was stupid enough to go along" at the urging of Hill, that Povish didn't know what was in the duffel bags, and that he gave the prosecution and police enough information to try Aceval and Pena but "didn't want to give enough to totally implicate [himself]." In fact, Povish did not "go along" out of stupidity and was not concerned that his statements would implicate him.

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[3] Before the judge could rule on an objection by respondent, Povish answered that the reason he did not hire an attorney is because he could not afford one. Respondent later used this answer in her closing argument.

Later in the afternoon of September 19, 2005, respondent had another *ex parte* conference with Judge Waterstone and admitted to some of the false testimony she elicited, i.e., that Povish lied when he denied being offered any deals, that Povish didn't remember what the police said to him when he was released (McArthur told him he had done a good job), and that McArthur lied when he testified that he had no information about where Povish was headed with the cocaine.

The next day, on September 20, 2005, respondent made a closing argument to the *Aceval* jury based on the false testimony of Povish: "He works as a personal trainer, he works as a carpet layer and he does car detailing. This is a hard-working young man who told you that, when he was in trouble, he knew he was in trouble but could not afford an attorney" (emphasis added). Thus, not only did respondent fail to prevent or remedy this testimony she knew to be false, she relied on it in her closing argument to bolster the credibility of Povish, to counter any suggestion that he was a paid informant, and to support the false testimony that he was actually worried about being prosecuted and would have hired an attorney if he could have afforded one. Later in the argument, respondent again painted Povish as a "kid . . . to stupid to know [he] should not be involved" and asserted that he and Hill had no immunity before "the middle of their testimony" and that the police made a judgment call about whether to prosecute the stupid kids or "the big dopers."

In response to a statement by defense counsel that the government "has the power to bring in certain evidence or withhold certain evidence," respondent bristled and showed her awareness of her obligations as a prosecutor and a member of the bar:

> MS. PLANTS: Judge, I'm going to object. I don't have the opportunity to withhold. Under the law I have to turn over all evidence to the defense. I would lose my job, I would lose my ability to practice as a lawyer. This would be a mistrial if I withheld evidence. So I object to that statement that I withhold anything.[Emphasis added.]

Finally, in response to another argument by defense counsel regarding the existence and identity of the confidential informant, respondent stated: "And he said and I could and can bring him in to testify. Do you know what? I could and can go to his funeral too. . . . [The CI's] life is at stake. ... I'm not going to bring him or her before you."

Pena was convicted, and Aceval's jury could not reach a verdict. During appellate proceedings in *Pena*, the Wayne County Prosecutor's Office confessed error, and respondent

describes the error as follows: "That Mr. Povish's ID as the confidential informant did not come out." Pena's conviction was set aside, and he pled to reduced charges in exchange for his testimony against Aceval in Aceval's re-trial. In March 2006, prior to the re-trial, respondent called Aceval's attorney and disclosed the identity of the confidential informant at the direction of, or upon the advice of, Mr. Baughman.

Thereafter, respondent's actions came to light. Respondent testified that she and two officers were charged with conspiracy to suborn perjury, that Judge Waterstone was charged with misconduct in office, and that respondent ultimately pled guilty to misconduct in office. In the disciplinary hearing before the panel, respondent candidly and forthrightly admitted her misconduct. She also acknowledged that she should have insisted that her witnesses not lie to the jury, and, in fact, should have pursued available options other than offering perjured testimony to the finder of fact, such as having the federal authorities prosecute the matter (because they can offer witness protection) or consulting with Povish about whether he was willing to testify openly about his role as a confidential informant (when she did do this prior to re-trial of Aceval, Povish took the option of disclosure of his identity).

II. Hearing Panel Report.

The hearing panel in this matter analyzed the applicability of various American Bar Association Standards for Imposing Lawyer Sanctions ("ABA Standards") in determining the appropriate level of discipline, as panels and this Board are required to do under *Grievance Administrator v Lopatin*, 462 Mich 235; 612 NW2d 120 (2000). On review, the Administrator argues that the panel erred in not determining that ABA Standards 5.11(a) and (b), 5.21, 6.21, each calling for disbarment, were applicable to the facts of this case.[4]

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[4] Standard 5.11 provides that disbarment is generally appropriate when:

> (a) a lawyer engages in serious criminal conduct, a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or the sale, distribution or importation of controlled substances; or the intentional killing of another; or an attempt or conspiracy or solicitation of another to commit any of these offenses; or
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> (b) 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.

The panel found that these three standards, as well as Standard 6.11, were potentially relevant to a degree, but found that Standard 5.2 (and Standard 5.22 in particular) was most clearly applicable. The hearing panel's analysis included the following discussion from its report:

> We find that respondent's actions deprived the defendants in the criminal case of their right to properly face and examine Chad Povish on the information he provided to the police as required under the confrontation clause of the Michigan and United States Constitutions. We also find that the attorneys for the defendants were denied the opportunity to inform and argue to the jury that Chad Povish was a paid confidential informant who was to receive a financial share of what was recovered in forfeiture proceedings against the defendants. While we have no difficulty finding that, by her conduct, respondent interfered with the administration of justice, the record does not establish that this interference was intentional within the meaning of Standard 5.11(a).
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> Specifically, while it is clear that respondent intentionally withheld the identity of the confidential informant from the defendants and their counsel, that is not necessarily the same thing as acting with an intent to interfere with the administration of justice. "Intent" is defined in Section III of the ABA Standards as the "conscious objective or purpose to accomplish a particular result." By contrast, "knowledge" is defined in the Standards as "the conscious awareness of the nature of attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result." In determining which Standard to apply in this case, we find that respondent's state of mind was generally consistent with the ABA's definition of "knowledge" rather than with the definition for "intent."

Standard 5.21 provides:

> Disbarment is generally appropriate when a lawyer in an official or governmental position knowingly misuses the position with the intent to obtain a significant benefit or advantage for himself or another, or with the intent to cause serious or potentially serious injury to a part or to the integrity of the legal process.

Finally, Standard 6.21 provides:

> Disbarment is generally appropriate when a lawyer knowingly violates a court order or rule with the intent to obtain a benefit for the lawyer or another, and causes serious injury or potentially serious injury to a party or causes serious or potentially serious interference with a legal proceeding.

Similarly, a state of mind characterized as "intent" is a key element of Standard 6.11, which 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.

As respondent testified, she lost the forest for the trees by focusing on what she thought was her paramount duty to insure the safety of the confidential informant. While respondent now acknowledges that the desire to protect the identity of the confidential informant did not justify the presentation of false testimony, we cannot say under the evidence presented that respondent clearly intended to interfere with the administration of justice, nor can we find that the evidence supports a finding that respondent intended to deceive the court within the meaning of Standard 6.11 when the evidence established that respondent disclosed to the court on two separate occasions that false testimony had been presented.

* * *

The petitioner suggests that because the respondent is an experienced prosecutor and because this was the biggest drug bust case that she had been involved with, that she wanted to win the case and was willing to do what she needed to do. Therefore, it is argued, respondent's actions were for personal gain. However, the evidence does not establish that respondent acted with intent to obtain a benefit for herself or another party or that respondent acted with a deliberate intent to cause a potentially serious injury to a party or to the integrity to the legal process. In light of these findings, we are also unable to apply ABA Standard 5.21.

III. Disbarment is the Appropriate Sanction for Respondent's Conduct Under the ABA Standards for Imposing Lawyer Sanctions and Attorney Discipline Caselaw.

Although the panel conscientiously strove to draw appropriate distinctions between this and other cases of interference with the administration of justice and presentation of false evidence to a tribunal, we ultimately conclude that disbarment is generally appropriate for the conduct at issue here, and is called for in this particular case. We do so based on the undisputed facts recited above (and in the Statement of Facts below), the ABA Standards applied as directed in *Lopatin*, and precedent from Michigan and other jurisdictions.

A. A Lawyer's Knowing Submission of False Testimony is Among the Most Serious of Ethical Violations and the Presumptive Sanction for Such Misconduct is Disbarment.

The inquiry prompted by the Standards and *Lopatin* requires examination of (1) the ethical duty violated; (2) the lawyer's mental state; (3) the extent of the actual or potential injury caused by the lawyer's conduct; (4) aggravating and mitigating factors; and, (5) "other factors, if any, which may make the results of the foregoing analytical process inappropriate for some articulated reason."[5] *Grievance Administrator v Ralph E. Musilli,* 98-216-GA (ADB 2000), p 2.

Dismissing respondent's testimony and argument that she "lost the forest for the trees" and made inartfully worded statements in an attempt to protect her witness, the Grievance Administrator argues that: "The hiding of the identity of the confidential informant (CI), Chad Povish, was not simply the criminal act of failing to disclose necessary information to the defense. It was a pattern of behavior -- over months -- that included the deliberate eliciting of false testimony and the making of false argument to the juries."[6] This reading of the record is impossible to contradict, even if one gives full credence to the panel's finding that the motive for her conduct was to protect the life of her witness.

The panel found that Standard 5.11 was inapplicable because, although respondent did in fact interfere with the administration of justice, such was not her intent. We cannot adopt this analysis for several reasons. First, intentionally procuring, or allowing to stand uncorrected, perjured testimony is itself an intentional interference with the administration of justice no matter what justifications may be offered. A New York decision regarding the professional conduct of an Inspector General who sought to protect a corrections officer "willing to risk retaliation for breaking the correction officers' 'code of silence'" by telling him to lie under oath was summarized by the Colorado Supreme Court as follows:

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[5] As the Court explained in directing this Board and the panel's to follow the Standards:

> We caution the ADB and hearing panels that our directive to follow the ABA standards is not an instruction to abdicate their responsibility to exercise independent judgment. Where, for articulated reasons, the 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.]

[6] Petitioner's Brief on Review, p 3.

> [The court rejected the argument] that his conduct was not unethical because he was motivated by the desire to protect the witness and by his public responsibilities. This argument is the equivalent of the contention that the end justifies the means, and "that pernicious doctrine" . . . is unacceptable in the administration of the criminal law.[7]

We do not mean to suggest that either the panel or the respondent has argued that the misconduct is *excused* here. Rather, both acknowledge the seriousness of the duty and its breach under these circumstances. However, in analyzing the respondent's state of mind, we do not believe it is acceptable to reason that the intentional use of perjured testimony – for any purpose – falls short of an intent to interfere with the administration of justice. Our system of justice is administered in accordance with certain fundamental principles, one of which is that lawyers may not intentionally procure or countenance false testimony, even for a purpose the lawyer may consider justifiable. To do so is to intentionally interfere with the administration of justice. Any other construction would erode a fundamental prohibition.

There are other reasons Standard 5.11 applies as well. In addition to recommending disbarment for crimes involving intentional interference with the administration of justice, Standard 5.11(a) suggests disbarment for crimes involving "false swearing, misrepresentation, [and] fraud." Moreover, Standard 5.11(b) calls for disbarment presumptively 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."

Further, Standard 6.11 provides:

> 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.

Clearly, Standard 6.11 articulates a presumptive[8] sanction for lawyers who submit false evidence to a tribunal. We consider it instructive and consistent with precedent in Michigan and elsewhere.

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[7] *People v Reichman*, 819 P2d 1035, 1038 (Colo 1981).

[8] We agree with respondent's astute observation about the use of this term and we use it in a manner consistent with that observation: "There is a qualitative difference between a presumption – which requires overcoming a threshold to warrant a deviation – and a sanction that is 'generally appropriate' in the absence of other factors." Respondent's Brief, p 18. "The latter situation," which employs the terminology of the Standards, provides not a true presumption but "the starting place for a calculus that includes other substantial factors." *Id.*

ABA Standard 6.11 was applied by the Arizona Supreme Court in a discipline matter resulting in the disbarment of a prosecutor who sought to bolster the credibility of a cooperating witness subject to impeachment because of multiple felony convictions and his agreement to testify to avoid prosecution on an unrelated charge. *In Re Peasley*, 208 Ariz 27; 90 P2d 764 (2004). Respondent Peasley presented the testimony of a detective to the effect that the detective had not learned the identity of certain murder suspects until he met with the witness. This was untrue. The prosecutor also told the jury in opening statements that this was what the evidence would show and argued this position in closing arguments. Although there are facts which can be said to distinguish *Peasley* from this case (e.g., respondent Peasley was prosecuting defendants for capital offenses, and he had prior instances of prosecutorial misconduct in his background which were not, however, the subject of formal discipline), the court's analysis of the applicability of Standard 6.1 is relevant here. The court stated that respondent Peasley "violated one of the most important duties of a lawyer," noted that "high ethical standards [are imposed] on prosecutors"[9] in light of the significant power of the office, and concluded:

> Peasley's intentional elicitation of false testimony against two defendants in a capital murder trial in 1993, re-presentation of the same false testimony in the 1997 retrial of one of the defendants, and exploitation of that false testimony in the closing argument in both trials, could not have been more harmful to the justice system. The credibility of the criminal justice system relies heavily on the integrity of those who work in the system. Moreover, a prosecutor has the added duty to see that justice is done [citing Arizona Rule of Professional Conduct 3.8]. A prosecutor who deliberately presents false testimony, especially in a capital case, has caused incalculable injury to the integrity of the legal profession and the justice system. In such a circumstance, the public's interest in seeing that justice has been fairly administered has been violated in a most fundamental way. Peasley's misconduct has severely undermined the public's trust and confidence in Arizona's criminal justice system. Therefore, in this case, "any sanction less than disbarment would be an inappropriate statement of what the bar and this court should and would tolerate."[10]

The application of Standard 6.11 in *Peasley* may be compared with the analysis of the Florida Supreme Court in *The Florida Bar v Karen Schmid Cox*, 794 So2d 1278 (Fla 2001). Respondent

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[9] *Peasley*, 208 Ariz at 35-36.

[10] *Peasley*, 208 Ariz at 41-42.

Cox, an Assistant US Attorney, introduced her witness to the court, jury and defense counsel as "Gracie Greggs," and so listed her as a witness when the court ordered disclosure, although Cox knew it was a false name. The witness, a confidential informant working for the Customs Service, was given the false name by Customs because she feared testifying at trial due to an ongoing custody dispute in Florida with her former husband. The informant's true identity was revealed mid-trial, resulting in dismissal of the indictment with prejudice. In disciplinary proceedings, the referee found violations of Florida's rules regarding professional conduct similar to Michigan and Model Rules 3.3 (knowingly making a false statement to a court and permitting a witness to offer testimony the lawyer knows to be false) and 3.4 (unlawfully obstructing a party's access to evidence and fabrication of evidence or assisting a witness to testify falsely). The Florida Court applied Standards 6.11 and 7.1 of the Florida Standards for Imposing Lawyer Sanctions and found that disbarment was the presumptive sanction.[11] The court also concluded that disbarment is the presumptive sanction under Florida caselaw for an attorney knowingly presenting false testimony in a judicial proceeding:

> *Florida Bar v. Agar*, 394 So. 2d 405 (Fla. 1980), is the most instructive on the conduct at issue here. In Agar, the attorney knowingly elicited and presented false testimony as to the identity of a witness during a court proceeding. Although the witness in Agar was the wife in an uncontested divorce proceeding and the substance of her testimony was to prove an apparently uncontested and minor issue in those proceedings, this Court disapproved the referee's recommended suspension of four months and disbarred Agar, stating that
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> > [n]o breach of professional ethics, or of the law, is more harmful to the administration of justice or more hurtful to the public appraisal of the legal profession than the knowledgeable use by an attorney of false

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[11] Florida Standard 6.11 is substantially similar, providing that:

> Disbarment is appropriate when a lawyer: (a) with the intent to deceive the court, knowingly makes a false statement or submits a false document; or (b) 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. [Language added by Florida underlined.]

Florida Standard 7.1 is identical to the ABA Standard and provides:

> Disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system.

> testimony in the judicial process. When it is done it deserves the harshest penalty.[12]

The Florida court also quoted extensively from state and federal authorities for the proposition that "a prosecutor has responsibilities beyond that of an advocate, and has a higher duty to assure that justice is served."[13]

Notwithstanding the foregoing, the Florida court found substantial mitigation ("'impressive list of state and federal judges, law enforcement officers, and associates who willingly testified'" as to various qualities, isolated incident, remorse) and imposed a suspension of one year. Perhaps, though it is not expressly articulated as such, the nature of the deception (using a fictitious name) was a factor in the court's decision. The court seemingly carved out an exception to Standard 6.11 by accepting the finding of the referee and concession of the Bar that respondent "Cox 'did not intend to deceive the United States District Court on any matter of substantial justice.'"[14]

In sum, it is widely held in American jurisdictions that, absent mitigating factors, "When a lawyer knowingly presents perjured testimony about the merits of a case, and especially where the lawyer has assisted in developing the testimony, disbarment is the presumptive sanction."[15]

Michigan's caselaw is in accord with that of other jurisdictions in terms of articulating the disciplinary norm for knowing elicitation of false testimony. As this Board recently said:

> [T]he Supreme Court and the Attorney Discipline Board have ordered the revocation of a respondent's license in cases involving perjury or the submission of false evidence to a tribunal. These include *Matter of Grimes*, 414 Mich 483; 326 NW2d 380 (1982) in which an attorney was convicted and imprisoned for filing false and fraudulent income tax returns and for counseling a client to make misleading statements on his behalf; *Grievance Administrator v Jeffrey VanTreese*, Case 90-137-GA (ADB 1982), in which an attorney was

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[12] *Cox*, 794 So2d at 1285-1286.

[13] *Cox*, 794 So2d at 1285.

[14] *Cox*, 794 So2d at 1281, 1283.

[15] 2 Hazard, Hodes & Jarvis, *The Law of Lawyering* (3rd ed), §29.12 n 2, p 29-59, citing:

In re Storment, 873, SW2d 227 (Mo 1994) (attorney disbarred for encouraging client to testify falsely at trial and presenting false testimony); *Matter of Edson*, 530 A2d 1246 (NJ 1987) (attorney disbarred for assisting clients in fabrication of false testimony and presenting false testimony at trial); *Board of Overseers of the Bar v Dineen*, 481 A2d 499 (Me 1984) (attorney disbarred for knowingly eliciting false testimony at trial from client); and *In re Peasley*, 90 P3d 764 (Ariz 2004) (prosecutor disbarred for suborning perjury of the investigating officer in two capital cases).

> convicted of the crime of use of cocaine and was found to have encouraged a client not to give truthful testimony to a grand jury during the proceeding leading to his conviction; and *Grievance Administrator v Dennis W. Koltunchik*, Case No. 92-128-GA (ADB 1993), in which the respondent's license was suspended for three years based upon a finding that he had counseled his clients against giving truthful testimony during sworn depositions in a criminal investigation. [*Grievance Administrator v Alexander Benson*, 08-52-GA (ADB 2010).]

In *Benson*, the hearing panel found that expert testimony regarding respondent's psychiatric condition rendered him eligible for an order of probation under MCR9.121(C) where he had drafted a false affidavit and counseled his client to testify falsely that it was the client, not respondent, who left an inappropriate voicemail for opposing counsel in extraordinarily contentious litigation. Although the Board was faced with factual findings that the respondent was eligible for probation, the Board held that the nature of the misconduct, like intentional misappropriation, was so serious that probation was inappropriate. However, the Board gave "substantial weight in mitigation to the compelling, and unrebutted, evidence regarding respondent's depression and the extent to which that condition contributed to respondent's actions" and increased discipline to a suspension of one year.

Similarly, in *Koltunchik, supra*, the Board declared disbarment to be the "expected" discipline, but found mitigation (including "continued rehabilitation from [respondent's] active alcoholism") and suspended for three years a lawyer who counseled his clients to give false testimony in a deposition. Two Board members would have suspended the lawyer for five years. The Board cited cases from other jurisdictions and quoted a Michigan Supreme Court decision disbarring a lawyer for felony tax evasion and procuring perjury:

> The legal system is virtually defenseless against the united forces of a corrupt attorney and a perjured witness. Thus, for an attorney at law to actively procure or knowingly countenance the commission of perjury is utterly reprehensible. [*Matter of Grimes*, 414 Mich 483, 494 (1982).]

The generally appropriate, i.e., presumptive, sanction in this matter is clear. The question is whether any of the mitigating factors considered by panel and argued by respondent warrant the imposition of a sanction less than disbarment.

B. The Mitigating Factors Present in this Matter, When Weighed Against the Aggravating Factors and Considered in Light of the Lawyer's Core Duty Not to Offer False Testimony, Do Not Convince us That a Sanction Less Than Disbarment Would Appropriately Protect the Public, the Courts and the Legal Profession.

Respondent has argued on review that we should affirm the hearing panel's order of suspension for two years. The hearing panel's report summarizes some of the mitigating and other factors the panel weighed in this case:

> We also note that while the respondent did not follow the advice she was given to disclose the identity of the confidential informant to the defense attorneys, she did disclose to Judge Waterstone on two separate occasions that false testimony had been given. The respondent and her attorney acknowledge that Ms. Plants' disclosures do not exonerate her from responsibility for the crime she committed and pled guilty to. But this panel does find that her actions go towards mitigating her conduct from conduct where disbarment is generally appropriate to conduct where suspension is generally the appropriate punishment.
>
> The respondent has acknowledged that when Judge Waterstone did not declare a mistrial on September 19, 2005, she should have sought dismissal of the case on her own. She also has testified that instead of trying to protect Chad Povish by hiding the fact that he was a confidential informant, she could have instead referred the case to the Federal Drug Enforcement Administration for prosecution where the witness could have been placed in a witness protection program.
>
> This panel finds that the respondent has committed misconduct in office by knowingly allowing false testimony to be given during a trial and by making misleading arguments to the jury. We note her past stellar record as a prosecutor and attorney, her lack of any prior disciplinary action, as well as her work in the community both prior and subsequent to her conviction. We note that she has candidly admitted to her guilt in this matter and has shown remorse for her actions. We are convinced that this was an isolated incident and that she does not pose a future threat of repeating such actions. The respondent was cooperative during the disciplinary proceedings and, as previously stated in this report, she did not act for self gain or to intentionally undermine the court or the criminal justice system.
>
> Nevertheless her actions caused an obstruction of justice and resulted in a criminal conviction serious enough to warrant incarceration. The respondent was an experienced prosecutor who, as she stated during her testimony, worked as a Wayne County

> Prosecutor from 1990 to 2008 during which time she tried over 500 felony cases and at the time of her conviction was head of the Major Drug Unit. [HP Report, pp7-8.]

This Board's responsibility to ensure consistency and continuity in discipline imposed under the ABA Standards and caselaw necessarily means that we may not always afford deference to a hearing panel's sanction decision, and that we may be required to independently determine the appropriate weight to be assigned to various aggravating and mitigating factors depending on the nature of the violation and other circumstances considered in similar cases. *Grievance Administrator v Saunders V. Dorsey*, 02-118-AI; 02-121-JC (ADB 2005).

We have carefully considered whether any of the mitigating factors offered by respondent are sufficient to alter what is the generally appropriate discipline for such a serious offense. In evaluating this question, we must keep in mind that "neither [respondent's] legal background [including the lack of previous discipline] nor [her] community accomplishments obliterate our responsibility to impose the discipline [her] violations warrant." *In Re Grimes*, 414 Mich at 497. And, as this Board has said:

> [T]he mitigating effect of certain factors identified in Standard 9.32 may be sufficient to warrant a decrease in the level of discipline in a case involving relatively minor misconduct while the same mitigating factors may not warrant consideration of discipline less than revocation in cases involving the "capital offenses" of law discipline, such as intentional theft of client funds held in trust or deliberate presentation of a forged document during a proceeding. [*Grievance Administrator v Che A. Karega*, 00-192-GA (ADB 2004), p 8.]

Initially, we note the panel's conclusion that respondent's *ex parte* conferences with the trial judge "go towards mitigating her conduct from conduct where disbarment is generally appropriate to conduct where suspension is generally the appropriate punishment."[16] This statement serves, in part, as an acknowledgment by the panel that, notwithstanding its selection of Standard 5.22 as a starting point, the type of conduct involved here is also viewed by the panel as generally calling for disbarment.

For several reasons, we do not afford much weight to respondent's disclosure of some of the perjured testimony to the trial judge in two *ex parte* conferences in chambers. While respondent now acknowledges her misconduct and that the disclosures to the trial judge do not provide an excuse,

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[16] HP Report, p 7.

she also contends that "the remedial action she took regarding false testimony at the evidentiary hearing and at the trial was ethically adequate" in light of the version of MRPC 3.3(a) and its comment in effect at the time of the misconduct. We cannot agree. That rule and a pertinent part of its comment provided:

> If a lawyer has offered material evidence and comes to know if its falsity, the lawyer shall take reasonable remedial measures.
>
> Comment
>
> **Remedial Measures**. If perjured testimony or false evidence has been offered, the advocate's proper course ordinarily is to remonstrate with the client confidentially. If that fails, the advocate should seek to withdraw if that will remedy the situation. If withdrawal will not remedy the situation or is impossible, the advocate should make disclosure to the court. It is for the court then to determine what should be done – making a statement about the matter to the trier of fact, ordering a mistrial, or perhaps nothing.

The plain text of this rule makes it clear that it applies when a lawyer "comes to know of [the] falsity" of testimony after it has been given. Then, the lawyer must remedy the testimony that occurred without the lawyer's knowledge or approval.[17] This rule, and the comment discussing it, do not provide refuge when the perjury comes as no surprise to the lawyer.

Also, respondent did not inform her colleagues of the whole picture (i.e., that she had been in on the plan to disguise Povish's identity from the beginning). When told to notify the judge outside the presence of the jury but not *ex parte*, she disregarded this advice. Further, not all false testimony given at trial was disclosed, and at no point was there an effort to remedy the false testimony at the preliminary exam. Finally, the perjury continued after the first conference with the judge and misleading arguments to the jury followed the second. As noted above, within the context of MRPC 3.3, such disclosures would be to remedy perjury a lawyer has discovered after presenting it. The rules do not, however, contemplate that a lawyer and judge may secretly agree that there is

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[17] See also, 2 Hazard, Hodes & Jarvis, *supra*, §29.12 n 2, p 29-19, which, discussing the ABA Model Rule substantially the same as Michigan Rule 3.3(a)(d) and the trailing paragraph, provides, in part:

> Rule 3.3(a)(3) actually sets forth two distinct duties. The first sentence . . . prohibits a lawyer from knowingly offering false evidence, whether or not it is "material." This sentence is not qualified in any way; it flatly prohibits a lawyer from "offering" evidence she "knows" to be false. The duty applies whether the false evidence will be offered by the lawyer (as in an exhibit or document), by the client, or by others. The second sentence of Rule 3.3(a)(3) posits a corrective duty: if the lawyer has innocently offered [material] evidence that she only later comes to know was false, she must take "reasonable remedial measures."

a good reason to submit perjured testimony to the jury, excuse a lawyer's intentional participation in procuring such testimony, and insulate the lawyer from consequences for further submission of false evidence.

The issues surrounding Povish's identity, credibility and compensation were not novel or unlikely to arise. The use of confidential informants is a time-tested, quite common, even essential tool of law enforcement.[18] However, defendants may file a motion for disclosure of the identity of an informant, as was done in this case.[19] In deciding such a motion, a court considers "the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors."[20] Perhaps most often, the "informer's privilege" (actually a government privilege to keep the identity secret, which exists so citizens will not be deterred from reporting criminal plots) results in a balancing of these factors that leads to continued confidentiality rather than disclosure. However, as the respondent commendably acknowledges:

> When a confidential informant also becomes a witness, the equation changes, as the accused's rights to confrontation and cross-examination then outweigh the prosecution's right to maintain the confidentiality of a non-witness informant's identity; the prosecution becomes obligated to disclose information relevant to the jury's consideration of the witness' credibility.[21]

In fact, an area of jurisprudence, and prudential practices for the police, has grown up around these issues. Generally, the closer the CI is to the transaction, the greater the likelihood that a court might require disclosure.[22] Accordingly, to avoid suppression of evidence or dismissal of the case,

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[18] *Rovario v United States*, 353 US 53, 66-67; 77 S Ct 623; 1 L Ed2d 639 (1957) (Clark, J, dissenting). See also, *People v Laird*, 102 Mich 135; 60 NW 457 (1894).

[19] See *People v Underwood*, 447 Mich 695; 526 NW2d 903 (1994).

[20] *Underwood*, 447 Mich at 705 (non-testifying informant), citing *Rovario*, 353 US at 62 (non-testifying informant).

[21] Respondent's Brief, p 14 (citing *Brady v Maryland*, 373 US 83, 87 (1963)).

[22] See, e.g., *Underwood*, 447 Mich at 712, 714 (Boyle, J., dissenting on the basis that "'where [the] informer did not participate in the illegal transaction, disclosure is not required'"). See also, Moore's Federal Practice – Criminal Procedure, § 616.07[3]:

> The informant's degree of participation in the offense is the most crucial factor in determining the need for disclosure. The critical distinction is between a transactional participant and a so-called tipster. If the informant was a participant in the acts that constitute the offense or was an eyewitness to some element of the crime charged, then it is far more important that disclosure and production of the informant be required in order to ensure a fair trial. On the other hand, if the informant is a "mere tipster," that is, someone who provided law enforcement with helpful information but did not participate in the criminal transaction or witness the commission of the crime, then disclosure is generally not required.

law enforcement is often advised to keep the CI away from the transaction.[23]

For various reasons, we must critically examine the claim that respondent was acting out of concern for the safety of Povish, the confidential informant. The very decision by respondent and the police to call the CI as a witness increased the likelihood that his identity would become known, thus increasing the risk to the witness. And it apparently did not take long here for Povish to be considered the person most likely to be an informant. By the preliminary examination it was known that Povish was released the same day he was arrested and had not been charged with a crime.[24] As respondent has acknowledged, she could have taken the case to the federal government (which has a witness protection program). Or, she could have asked Povish earlier if his identity could be disclosed (he agreed to this for the re-trial of Pena). Or, she could have proved the case or attempted to do so without him (respondent asserts that the evidence of guilt was overwhelming[25]). Or, she could have simply not proceeded with the prosecution in order to avoid using a CI as a witness.[26] But, building a case upon false testimony was not an option allowed by the Michigan Rules of Professional Conduct.

Even granting full deference to the panel's assessment of respondent's subjective motivations, we have another decision to make on review, and that is whether an ostensible or actual good purpose is a proper factor in mitigation when imposing discipline for the misconduct here. Members of the bar should know that even where the situation is not of respondent's own making, we will be very conservative with respect to finding mitigation which would justify anything but the

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[23] See, e.g., 1A-23 Criminal Defense Techniques (Matthew Bender 2011), § 23.07[2][a]:

> Aware of these problems, the government will often plan its pursuit of the target in a way that insulates the informant from having to testify. Methods for insulating the informant include:
>
> 1. Asking the informant to introduce the target to an undercover agent who then negotiates the transaction;
>
> 2. Corroborating the information through surveillance, tape recordings, or subpoenas of telephone, bank or travel records; and
>
> 3. Making sure the informant is not present at the arrest scene.

[24] P's Ex 2, pp 50-52. See also respondent's testimony that "there is no way" that the other five men "who were not from the state of Michigan would have been the confidential informant to a small local police department. I think it narrowed it down to the snitch had to be either Chad Povish or Bryan Hill." Transcript of the May 16, 2011 attorney discipline hearing ("Tr"), p 76.

[25] But see her testimony that she would not get a conviction without the testimony of both Hill and Povish. Tr, p 157. And see, Tr, pp 170-171 (case against Pena could have been made, but not the case against Aceval).

[26] Officer Ashford, one of respondent's character witnesses, described two of the choices: "One, either just let the case go, we have to start all over from scratch; or, two make it known just who everyone [was]." Tr, p 36.

strictest fidelity to the ethical proscription against offering false testimony. To allow each lawyer to decide that the ends justify the means would riddle the fundamental prohibition against offering false testimony with holes imperceptible to the participants in our justice system, and thereby render that system itself suspect. Thus, we do not disagree with our concurring colleague's observations which essentially conclude that mitigation must be compelling in order to avoid the most serious sanction.[27]

We also acknowledge Chairman Kienbaum's thoughtful comments to the effect that exceptions to disbarment have been made by panels and the Board in other cases, but respectfully disagree that remand is necessary. The panel and the parties did an excellent job of probing the main features of the misconduct and they certainly considered the mitigating and aggravating factors thoroughly.

As for respondent's absence of a prior disciplinary record since her admission to the bar, we have considered that favorably, but we must also consider this period of unblemished conduct against the experience it has afforded her. Respondent's substantial experience should have led her to reject the path she chose. We also note the imposition of other penal sanctions, which is most often considered mitigating when the misconduct does not involve such a serious violation.[28] Also to be taken seriously is respondent's cooperation during the disciplinary process, along with her professions of remorse. These are important and may have salutary effects in the future, but they simply are not factors of sufficient weight to mitigate the sanction required both under the circumstances of this case and in order to deter similar conduct by others in the future.

Further, we consider respondent's good works. Respondent was admitted to the practice of law in Michigan in 1988. She clerked for a federal district judge for two years and joined the Wayne County Prosecutor's Office in 1990. She worked in various units, served as a felony trial prosecutor and, from 2004 until the time she left the office in 2008, she was the principal attorney in the Major

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[27] See *Grievance Administrator v Che A. Karega*, *supra* ("capital offenses" under the Rules of Professional Conduct may not be as susceptible of certain mitigation). Compare, *Grievance Administrator v Frederick A. Petz, 99-102-GA; 99-130-FA* (ADB 2001) (knowing conversion of client funds will result in disbarment absent "compelling" mitigating circumstances).

[28] *Grievance Administrator v Arnold M. Fink*, 96-181-JC (ADB 2001), p 19, lv den 465 Mich 1209 (2001):

> penalties associated with conviction do not always mitigate the sanction we would otherwise consider appropriate. For example, crimes such as embezzlement or fraud may carry heavy penal sanctions designed to serve the ends of the criminal justice system and yet virtually always also result in lengthy suspensions or disbarment in order to protect the public, the courts and the legal profession.

Drug Unit. Respondent trained federal and state law enforcement officers throughout the Detroit metropolitan area on the law of search and seizure, among other things. She has lectured in law schools and in undergraduate institutions, has served the State Bar of Michigan in various capacities, and has garnered professional awards from her employer and law enforcement agencies. Additionally, she has served the broader community through volunteer work for several organizations on behalf of the sick, disabled, and homeless. This record of professional accomplishments and devotion to betterment of society makes the misconduct in this case all but inexplicable and has made our task here one which we approached with solemnity and a measure of sorrow. However, as our concurring colleague points out: "Regardless of our sympathy for the unfortunate circumstances of the disciplinary respondent, the paramount concern must always be the protection of the public and the profession."[29]

Finally, this was not a situation in which a lawyer was impaired or had no time to reflect and made a single poor judgment in the heat of a trial or a hearing. The deception here is pervasive, spanning the entire case, from the warrant stage through closing arguments. And respondent pushed on at every juncture where she could have done the right thing. Respondent allowed numerous instances of false testimony to go before the jury and she doggedly and persistently fought to suppress the truth whenever questions to Povish could have led the scheme to unravel.

IV. Conclusion.

The Administrator argues that respondent did not suddenly find herself in a jam; nor did the situation unexpectedly "snowball." We agree. She made a decision to call a confidential informant who participated in the drug transaction as a witness at trial, and then she did what was necessary to keep his relationship to the police from the jury. The lack of reflection about the seriousness of the submission of false testimony that is shown by respondent's failure to consider readily available and ethically required alternatives is disturbing. Even if, despite her extensive experience, respondent found herself in unfamiliar territory, the option she chose for dealing with it was clearly prohibited by the Rules of Professional Conduct and other law: "It has long been established that the prosecution's 'deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with the rudimentary demands of justice.'"[30]

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[29] *Grievance Administrator v Alvin O. Brazzell*, DP-100/81 & DP-125/82 (ADB 1983), citing *In Re Grimes*, 414 Mich 497.

[30] *Banks v Dretke*, 540 US 668, 693-694; 124 S Ct 1256; 157 L Ed2 1166 (2004) (Habeas proceedings; prosecution hid informant status of witness who falsely denied speaking with police, taking money or being promised anything by police).

Therefore, although this lawyer has served the system well in the past, when we consider the mitigation offered against the backdrop of the entirety of the circumstances here, it is our considered view that disbarment is not only appropriate in this case, but that anything less would seriously weaken a lawyer's cardinal duty to the system of justice.

Board members James M. Cameron, Jr., Andrea L. Solak, Craig H. Lubben, Jr., Sylvia P. Whitmer, Ph. D., Lawrence G. Campbell, and Dulce M. Fuller concur in this decision.

Board member James M. Cameron, Jr., concurs in a separate opinion.

Board member Thomas G. Kienbaum, in a separate opinion, concurs in part and dissents in part.

Board member Carl E. Ver Beek, in a separate opinion joined by Rosalind E. Griffin, M.D., dissents.

Separate Concurring Opinion of Board Member James M. Cameron, Jr.:

I agree completely with the conclusions, the rationale and what I consider to be the inevitable result as set forth in the Board's opinion. I write separately simply to emphasize that lawyers, as officers of the court, should not countenance the presentation of perjured testimony under <u>any</u> circumstance and that there is virtually no mitigation that can serve to avoid disbarment when a lawyer engages in the conduct so meticulously recounted in the Board's opinion.

This may be seen by some as a strong statement, and it is meant to be. But there is an additional factor in this case which, to me, requires even more emphasis. Regardless of any mitigating factors which may be weighed in respondent's favor, her misconduct was aggravated by her status as a prosecutor. This special status is recognized by our Supreme Court in the opening sentence of the comment to MRPC 3.8:

> A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.

Cases referring to this special status of a prosecutor are properly cited in the Board's opinion. As recently as March 8, 2012, this principle was reiterated by the District of Columbia Court of Appeals in its decision to order the disbarment of a former Assistant United States Attorney who wrongfully distributed more than $42,000.00 worth of witness vouchers to individuals who were ineligible to receive them and who compounded that misconduct by failing to disclose the voucher payments to either the court or opposing counsel even though such payments were relevant to the jurors' credibility determination of key government witnesses' testimony. Recognizing that the misconduct in that case was aggravated by the respondent's status as a prosecutor, the court said:

> The determination of an appropriate disciplinary sanction has heightened significance in the context of a prosecutor's fitness to practice law, because the prosecutor's violation of ethical rules is compounded by his additional duty to the public. [fn omitted] The fair administration of justice relies, in large part, upon the integrity, honesty and trustworthiness of prosecutors, and where misconduct causes a prosecutor's ethics to be questioned, the entirety of the criminal justice system is called into question.
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> . . .
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> Additionally, failure to sanction respondent with our most extreme sanction would endorse respondent's reasoning that honorable ends justify unlawful means, failing to deter others from adopting similar attitudes. Not only does this type of conduct impugn a prosecutor's moral fitness to practice law, but prosecutorial actions such as these can place another's liberty interests in the balance. The appropriate sanctions should reflect this gravity. [*In Re G. Paul Howes, Respondent*, District of Columbia Court of Appeals Case No. 10-BG-938 (Decided March 8, 2012).]

This, to me, summarizes the essence of this case. In a 1982 disbarment case, our Supreme Court considered the case of a lawyer who had been convicted of two felony counts of tax evasion compounded by his counseling a client to lie to investigators in connection with the tax fraud case and concluded, "Regardless of our sympathy for the unfortunate circumstances of the disciplinary respondent, the paramount concern must always be the protection of the public and the profession." *Grievance Administrator v Alvin O. Brazzell*, DP-100/81 & DP-125/82 (ADB 1983), citing *In Re Grimes*, 414 Mich 483, 497; 326 NW2d 380 (1982). If that declaration is to have continued vitality, disbarment must be ordered in this case.

Separate Opinion of Board Chairperson Thomas G. Kienbaum, Concurring in Part and Dissenting in Part:

I respectfully dissent from that part of my colleagues' opinion concluding that disbarment is the appropriate sanction in this case. While I agree with the well-reasoned conclusion that the misconduct warrants presumptive disbarment, I believe mitigating circumstances exist which should be carefully examined by the hearing panel to determine whether disbarment, as opposed to a suspension for a number of years, is appropriate. Because the hearing panel began its analysis with the wrong presumptive sanction (by applying Standard 5.22 instead of Standards 5.1 and 6.1, and

precedent declaring disbarment the generally appropriate sanction), I would remand to the panel for a determination of the proper sanction.

Respondent's conduct was serious and inexcusable. That is why the sanction of disbarment is presumed as "generally appropriate." I agree with respondent and the majority's opinion that our use of the term "presumptive sanction" in various opinions does not displace the language of the standards ("generally appropriate"). Indeed, this Board has held that, while intended to promote consistency as well as reasoned and constant consideration of pertinent factors, the ABA 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*, 98-114GA; 93-133-FA (ADB 1999). But I am concerned that our majority's opinion may be read as making the seriousness of the misconduct – which is an established fact before we are to consider mitigating circumstances - determinative, thus conflating two separate inquiries: what was the violation and, if a violation is found to exist, what is the proper discipline.

We have frequently permitted mitigating factors to lead to a sanction less than disbarment in the case of lawyers who misrepresent facts to the court, including by way of committing or allowing perjury. For instance, in *Grievance Administrator v Benson*, 08-52-GA (ADB 2010), we suspended a lawyer who had conspired with his client to submit a blatantly false affidavit to the court for only one year. We took into account mitigating circumstances dealing with emotional difficulties – something I would give much less weight to than a fear that someone's life is in danger but for the misrepresentation. Similarly, in *Grievance Administrator v Koltunchik*, 92-128-GA (ADB 1993), the lawyer had advised two clients to lie to the court on material points. We approved a suspension of three years, acknowledging the respondent's otherwise untarnished reputation and recovery from alcoholism.

Perhaps we were too lenient in those cases and others. If so, we should say so and announce that there is virtually no mitigation that can serve to avoid disbarment when a lawyer makes a material misrepresentation to the court, and/or permits a witness to testify untruthfully. We have not done so in this case, but could be read to be leaning in that direction.

There are significant mitigating factors in this case. These include the presumably undisputed fact that Respondent here acted not for personal gain (pecuniary or otherwise), but

instead only because of an apparently well-founded fear for the safety of the informant. As the hearing panel found:

> [T]here is nothing in the record before us that convinces this panel that respondent acted with the intent to deliberately deceive the court for personal gain. Ms. Plants testified that she feared that if the defendants became aware that Chad Povish was the confidential informant that his life would be in grave danger. We believe that this was the motivating factor behind her conduct. [HP Report, p 7.]

To restate the obvious, this did not excuse Respondent's conduct, and of course there were alternatives available to her. But that does not change the fact that her motive apparently was not selfish, as it was in the two cases cited above.[1]

There are other factors that deserve consideration. Respondent had an apparently undisputed reputation and record of service to the public that was outstanding up to the point of her misconduct. Her cooperation and remorse appear unquestioned. Her actions already removed her from the pinnacle of her career to the status of a convicted felon, and no matter what, she will be deprived of her license to practice law for a considerable period of time.

To be sure, there are aggravating factors. These include her experience which must have informed her that her actions violated a number of important prohibitions and duties, and that alternatives were available. Her conduct spanned, and was repeated, over a considerable period of time.

While we could, on this record, make a determination on the appropriate sanction, I would prefer to have a panel carefully evaluate all relevant facts against the standards, with the knowledge that disbarment is presumed, but not required. Perhaps that panel would recommend disbarment, and could point to a record justifying that result. But this is a case whose factual setting implicates a number of conflicting concerns, and in this instance a hearing panel's reasoned assessment of all relevant factors against the proper standard would, in my opinion, be warranted.

Dissenting Opinion of Board Member Carl E. Ver Beek, joined by Rosalind E. Griffin, M.D.:

Despite the admittedly serious misconduct in this matter, I respectfully disagree with the majority Opinion and the Concurrence in this matter.

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[1] Perhaps an aspect of selfishness – pride and ambition – impacted Respondent when she decided on the wrong course in order to protect the confidential informant. But that would be speculation at this point.

I would affirm the Panel's two year suspension.

I agree that using perjured testimony is extremely reprehensible and deserves strong discipline. However, this record reflects mixed motives for doing so which the Panel has carefully considered.

I concur with the Dissent that the Panel properly considered the mitigating factors. However, I decline to remand this to the Panel. I see no need for further formal proceedings. The Panel's record is sufficient to conclude that a two year suspension is appropriate. Further proceedings would require a difficult hearing which is likely to end with the same result. I prefer to affirm the Panel's decision on the scope of the discipline and end this sad matter.

STATEMENT OF FACTS WITH QUOTATIONS FROM AND CITATIONS TO THE RECORD

A. The Drug Bust and Warrants in *People v Aceval* & *People v Pena*.

On March 11, 2005, respondent received a telephone call from officers in the Inkster Police Department seeking approval of a search warrant for premises connected to a suspect who had been caught with 47 kilograms of cocaine.[1] The record before the hearing panel includes the search warrant and affidavit, signed by Inkster police officer Shawn Adams and approved via phone by respondent, authorizing the search of the Farmington Hills residence of Alexander Aceval.[2] The affidavit portion of the document recites various facts, including that: Aceval sold and transported large amounts of cocaine from a bar he owned and operated (J Dub's); Aceval kept drugs, proceeds of drug sales, and guns at his residence; and, a drug transaction took place at the bar on March 11, 2005, the date of the warrant and affidavit. Much of the information in the affidavit came from an unnamed source of information referred to as "SOI." The affidavit recited that "two unknown white males exited [a] vehicle and entered the bar," and contained other references to one or more "unknown white males," one of whom was observed carrying a black duffel bag from the bar to a car while Aceval carried a similar bag from the bar to the car and followed the first car out of the bar's parking lot. The police stopped the cars and found 25 one-kilogram bricks of powder cocaine in one duffel bag and 22 such bricks in the other.

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[1] Transcript of the May 16, 2011 attorney discipline hearing ("Tr"), pp 50-51.

[2] Petitioner's Exhibit ("P's Ex") 1.

The two white males were not, in fact, unknown to the police. One was Chad Povish and the other was Bryan Hill. Respondent learned this shortly after she had authorized the search warrant over the phone. Respondent testified before the hearing panel that two days later (Sunday, March 13, 2005) she "went into the office to review the arrest warrants for Alexander Aceval and Ricardo Pena," and:

> A. At that time I wondered how come Bryan Hill and Chad Povish weren't charged. And, in fact, on the original warrant request I started to write in their names because I didn't understand, based on the facts that were given, why they weren't charged as co-conspirators. So I called the officer in charge, Officer Bob McArthur, and I asked him why I shouldn't write in their names and charge them as part of the conspiracy too, and that's when I learned that Chad Povish was the confidential informant, and that he didn't want Bryan Hill charged as additional coverage for Chad Povish's role as confidential informant.
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> Q. In fact, did you at some point learn that when the arrest went down, that even though Povish had been the informant, that he was booked as if he were really being arrested?
>
> A. Both, both Chad Povish and Bryan Hill were put through the booking process.[3]

From that point forward, respondent understood that Chad Povish was the confidential informant, and she and the officer in charge agreed that Povish would testify at the preliminary examination.[4]

B. The Preliminary Examination and False Testimony Therein.

The preliminary examination was held before 27th District Court Judge Randy L. Kalmbach on March 24, 2005. The first witness was Sergeant Scott Rechtzigel, of the City of Inkster Police Department, who was present at J Dub's bar and at the arrest of Aceval and another defendant, Ricardo Pena, on March 11, 2005. Rechtzigel testified that after Aceval arrived at the bar, another car drove up and, "There [were] two white male occupants, later identified. One was a Chad Povish."[5] During the preliminary exam, Sergeant Rechtzigel continued to characterize both Chad

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[3] Tr, pp 54 - 56.
[4] Tr, pp 116 - 117.
[5] P's Ex 2, p 11 (emphasis added).

Povish and Bryan Hill as unknown to the police until later identified when, in fact, Povish was the confidential informant who led them to Aceval and Pena.[6]

Povish testified that he drove his car to the bar "[t]o do some work" that Bryan Hill asked him to do so, and that he did not know what was in the duffel bags or that the "work" would be illegal.[7] And, during defense counsel's cross-examination regarding his time in custody at the police station and whether he was told he was under arrest, Povish testified as follows:

> Q. So, you weren't worried about why you were there because you weren't told you were being charged with anything?
>
> A. Yeah, I was worried why I was there. . . .
> Q. And to this day, you've never been charged with any criminal activity; is that correct?
>
> A. Correct.[8]

At the conclusion of the preliminary exam, respondent argued for bindover and defense counsel argued for dismissal, and the question of the reasonableness of the officer's suspicion to stop the cars became an issue. During an evidentiary hearing on that question, Sergeant Rechtzigel testified that the police had used the confidential informant several times in other cases and that the informant was being paid.[9]

Respondent did not counsel her witnesses to testify truthfully prior to the preliminary exam.[10] At no time did respondent attempt to take a break in the proceedings to remonstrate with her witnesses or pursue other action to correct the record or remedy the perjury. Nor did she do so at any time after the preliminary examination. And she did not tell the officers that such false testimony could not be repeated in future proceedings.[11]

C. Pre-trial Proceedings & Continued False Testimony.

Various pre-trial proceedings were held in the *Aceval* and *Pena* matters, including motions to suppress evidence and to disclose the identity of the confidential informant. In fact, several

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[6] P's Ex 2, pp 11-12, 14 ("identified (sic)"), and 21.
[7] P's Ex 2, pp 33, 37-38, 43.
[8] P's Ex 2, p 52.
[9] P's Ex 2, pp 133-134.
[10] Tr, pp 79, 117-118, 123-124.
[11] Tr, pp 180-181.

motions to suppress evidence were made and hearings were held in the summer and up until shortly before trial in September.[12] A *Franks*[13] hearing was held on June 17, 2005, at which the defense alleged that a confidential informant did not exist, and the trial judge, Wayne County Circuit Judge Mary M. Waterstone, reviewed the police file with the police officer in charge of the investigation *in camera* and learned that Chad Povish was the confidential informant.[14] Respondent learned during the *Franks* hearing that Povish would receive a percentage of the forfeiture proceeds for testifying.[15]

Respondent also testified that Sergeant Rechtzigel lied at a *Walker*[16] hearing:

> A. On cross-examination, Mr. Scharg asked Sergeant Rechtzigel prior to March 11th, 2005, had he ever met Mr. Aceval, Mr. Povish, or Mr. Hill. Sergeant Rechtzigel indicated that he had not met Mr. Aceval nor Mr. Povish prior to March 11th of 2005. That was a lie. He had met Chad Povish in his capacity as a confidential informant for the Inkster Police Department. I didn't say anything at the time. I knew it was a lie.
>
> I went up to my office, I consulted with my supervisor, Nancy Diehl. She indicated she had never encountered a problem like that, go talk to Tim Baughman and talk -- who was head of our appellate bureau at the time, or appellate department.
>
> I talked to him and, based on his advice, I contacted the judge and asked her if we could do an *ex parte* sealed record, I wanted to make a record of the fact that Sergeant Rechtzigel had committed perjury.
>
> Q. And did you do that?
>
> A. Yes.
>
> Q. And was that on September 8th, 2005?[17]

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[12] Tr, pp 91-92, 124.

[13] A hearing on a motion to suppress evidence based on the claim that false information was contained in a search warrant. *Franks v Delaware*, 438 US 154 (1978).

[14] Tr, pp 66-69.

[15] Tr, p 140.

[16] An evidentiary hearing on a defendant's motion to suppress an incriminating statement to the police. See *People v Walker*, 374 Mich 331 (1965).

[17] Tr, pp 63-65, 91-92, 122-124.

D. The First Ex Parte Conference With the Trial Judge & Selective Disclosure of Perjury; Instructions to Witnesses Prior to Trial.

The transcript of the September 8, 2005 *ex parte* conference in chambers was introduced in the hearing before the panel as Respondent's Exhibit A. In the conference, respondent informed the judge that she had information indicating that defendants Aceval and Pena had narrowed the identity of the confidential informant (sometimes referred to as "CI") to either Chad Povish or Bryan Hill, and had the judge sign *ex parte* orders blocking attempts to subpoena their phone records. With respect to the subject of perjured testimony, respondent made the following statements to Judge Waterstone:

> MS. PLANTS: We were doing an evidentiary hearing on Tuesday concerning Mr. Pena and, with Mr. Feinberg's prompting, Mr. Scharg asked the witness, Sergeant Rechtzigel, whether he had met Chad Povish, Brian Hill [sic] or the defendant prior to March 11th, 2005. Sergeant Rechtzigel said no. This clearly contradicts earlier testimony he gave about the CI which [sic] he had met.
>
> He knowingly committed perjury to protect the identification of the CI. To answer yes would have indicated that he had met them in a confidential informant capacity.
>
> I did not object at that point because I thought an objection would telegraph who the CI is. I let the perjury happen. He committed perjury knowingly, all in efforts to comply with the Court's order to keep the CI confidential.[18]

The judge added that she thought the CI was "in grave danger" and was "very concerned about his identity being found out."

Although respondent testified that her actions in conducting the *ex parte* conference with the judge were consistent with the advice she received, she also testified that, "[Mr. Baughman's] first advice was to hold a hearing with the defense attorneys and the judge,"[19] and that she did not inform her colleagues about the false search warrant, or the perjury at the preliminary exam.[20] Nor is there any indication in the record that additional advice was sought as the perjury continued during trial.

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[18] R's Ex A, pp 3-4.
[19] Tr, p 66.
[20] Tr, p 131.

On the eve of trial, respondent did not tell her witnesses to tell the truth. Instead, she "had a conversation in the witness room with the Inkster police officers [about how to handle defense questions about the identity of the CI, or the role of Povish], indicating to them that I had spoken to somebody in our Appellate Bureau and that, you know, we were going to try and keep the record clean by me objecting. If something did come out, I would make a sealed record."[21]

E. Trial.

1. The September 13, 2005 Trial Proceedings.

The trial commenced on September 13, 2005, and respondent called Sergeant Rechtzigel to testify. Respondent asked the following questions and received the following testimony:

Q. What happens next?
A. Moments later, then a few minutes, a second vehicle pulls into the lot.

* * * * *

Q. Is the Oldsmobile occupied by one or more people?
A. It was occupied by two white males.

* * * * *

Q. Then did you come to find out later who the driver was?
A. Yes.
Q. And who was that?
A. Later identified as Chad Povish.
Q. And the passenger?
A. It was a Bryan Hill.[22]

Respondent's examination of Sergeant Rechtzigel continued:

Q: The third white male, later did you find out who that was?
A: Yes.
Q: Who was that?
A: Bryan Hill.[23]

She then asked Rechtzigel about events upon entering J Dub's:

Q: What happens when you get inside?
A: When I get inside, one of the doors are unlocked. A white male, we later identified as Bryan Hill.[24]

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[21] Tr, p 128.
[22] P's Ex 3, pp 7-8, emphasis added.
[23] P's Ex 3, p 15, emphasis added.
[24] P's Ex 3, p 30, emphasis added.

Thus, the knowing presentation of false testimony was repeated, this time to a trier of fact. Furthermore, respondent elicited this testimony with questions containing the false predicate, i.e., by asking not only "who was the driver," but, "did you come to find out later who the driver was"?

2. The September 15, 2005 Trial Proceedings.

The September 15, 2005 *Aceval/Pena* trial transcript was put into evidence by the Administrator. It shows that, prior to calling in the jury, a record was made at the request of defense counsel regarding "rewards to the confidential informant."[25] By this time, it was apparent that Povish and/or Hill were probably the informants, and defense counsel may even have suspected that they were lying about their lack of involvement with the police and the absence of any "deals." In any event, the transcript reflects that the jury had been told that there was a confidential informant and that he or she was paid by the police.[26] Defense counsel wanted the amount of the actual payment to be introduced into evidence. During the argument on admission of this evidence, defense counsel argued that he should be entitled to introduce the actual amount because "during jury voir dire Ms. Plants attempted to plant in the minds of the jurors that maybe 15 dollars, I remember 15 dollars was mentioned by Ms. Plants during voir dire," and that this "opened the door."[27] In answering the argument and defending her hypothetical amount, respondent stated that "there were no deals":

> MS. PLANTS: Judge, first of all, that's voir dire. My voir dire was in response to him saying that I had made deals with witnesses and snitches, that I agreed not to charge them in return for their testimony which was not true until the middle of Bryan Hill's testimony yesterday. We had never met before last week. There were no deals. He planted that in the jury's mind.[28]

Another issue was addressed before the jury heard from Mr. Povish. Apparently, on the previous day of trial, respondent had offered immunity to Hill under protest. On September 15, 2005, she found herself in the same position with regard to Povish:

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[25] P's Ex 4 (transcript of September 15, 2005 trial proceedings), p 8.

[26] P's Ex 4, p 10.

[27] P's Ex 4, p 10-11.

[28] P's Ex 4, p 11. After Judge Waterstone ruled that the amount of compensation was not relevant, respondent ultimately agreed that Officer McArthur could be asked about the percentage formula used to compensate confidential informants. *Id.*, p 12.

> THE COURT: All right. Then let's bring Mr. Povish out.
>
> MS. PLANTS: Wait, wait. As long as the record is clear that me putting immunity on the record is at Mr. Feinberg's prompting. I didn't need it, Mr. Hill didn't need it, Mr. Povish doesn't need it. We are all of an understanding based on the obvious, that they are here in trial acting as witnesses, not defendants. . . . My problem is I never made a deal with him [Povish] and I'm being forced into it now. So I don't want him [defense counsel] to get up and argue during closing, oh, these witnesses got immunity.
>
> MR. FEINBERG: We can argue anything we want.
>
> MS. PLANTS: Well, Judge, see, that's the problem.
>
> THE COURT: Then she wants to bring in information, she wants to be able to argue back that that didn't happen until today.
>
> MR. FEINBERG: Right.
>
> MS. PLANTS: At Mr. Feinberg's prompting.
>
> THE COURT: At Mr. Feinberg's first request and Mr. Scharg's request.
>
> MR. FEINBERG: Anything she needs to say in response to my arguing that the immunity or promise not to prosecute, sure.
>
> THE COURT: All right. . . .[29]

After the court made it clear that respondent would be allowed to rebut defense counsel's argument that the witnesses received immunity or a promise not to prosecute, the offer of immunity was made to Povish on the record, and the subject of perjury was expressly addressed:

> MS. PLANTS: I so promise, Judge, I will not prosecute him for anything he testifies to today or anything that he testified to at the preliminary exam on March 24th, 2005.
>
> MR. FEINBERG: I assume that that eliminates perjury, that does not include perjury?
>
> MS. PLANTS: That goes without saying.

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[29] P's Ex 4, p 13-14.

> MR. FEINBERG: It may be, of course, that we know, but the witness has to understand that, if he commits perjury, then that's outside the immunity or the promise not to prosecute.[30]

Defense counsel's attempt to deter respondent and Povish from offering false testimony was not successful, however. On direct examination of Chad Povish respondent elicited testimony regarding Povish's role and observation of events in connection with the transporting of the cocaine on March 11, 2005. She also elicited testimony consistent with Povish's preliminary examination testimony, i.e., that he did not know what "work" he would be doing with Bryan Hill at J Dub's and that he did not know what was in the duffel bags.[31] That testimony was false. At the conclusion of her direct examination of Povish, respondent asked the following questions and received the following answers:

> Q. You testified at a preliminary examination back on March 24th, 2005, in Wyandotte; correct?
>
> A. Yes.
>
> Q. Prior to you taking the stand, similar as you are today, did I meet you?
>
> A. No.
>
> Q. Did I talk to you?
>
> A. No.
>
> Q. The first time I spoke words to you was to ask you your name in front of the Judge; correct?
>
> A. Correct.
>
> Q. Between March 24th, 2005 [the date of the preliminary examination], and last Wednesday, did I meet with you?
>
> A. No.
>
> Q. Did I talk to you?

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[30] P's Ex 4, pp 15-16.
[31] P's Ex 4, pp 20, 27.

A. No.

Q. Did I ever offer you a deal?

A. No.

Q. Did I ever offer a [sic] immunity?

A. No.

MS. PLANTS: Thank you. I have no further questions.[32]

While it may have been literally true that respondent did not personally discuss a deal with Povish prior to trial, the police clearly did so and she went along with the deal.

The remainder of the cross-examination of Povish was replete with false testimony. The question of Povish's sources of income was the addressed by the defense. In her direct examination, respondent had also asked Povish what he did for a living. On cross-examination, defense counsel followed up on Povish's direct examination testimony that he worked as a flooring installer and personal trainer:

Q. Are those your only sources of income?

MS. PLANTS: Judge, I will object. I don't see how it's relevant.

THE COURT: Sustained.

MR. FEINBERG: It was brought out by the prosecutor during direct testimony. Why am I precluded from following up on what she opened the door?

THE COURT: She asked if he was working and he said what he was doing. If you want to examine him on that.

MR. FEINBERG: All I'm asking does he have any other source of income.

THE COURT: That is not relevant whether he has another source of income. It's not relevant. You can ask him if he has another job.

BY MR. FEINBERG:

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[32] P's Ex 4, p 28.

> Q. Do you have another job of any kind that you get any kind of money or anything of monetary value?
>
> MS. PLANTS: Judge.
>
> A. I detail cars.
>
> Q. And that's it?
>
> A. Yes.[33]

The cross-examination continued, covering the question whether Povish had met with Sergeant Rechtzigel or Officer McArthur prior to the date of the drug bust:

> Q. Prior to the 11th of March did you ever meet with Sergeant Rechtzigel or Officer McArthur?
>
> A. No.
>
> Q. Never met either one of them?
>
> A. No.
>
> MS. PLANTS: Objection; asked and answered.
>
> THE COURT: Yeah. I think the objection should be sustained.[34]

Later in the cross-examination, Povish testified that neither Officer McArthur, Sergeant Rechtzigel, or anyone else offered him any deals of any kind, and that he had never seen Officer McArthur prior to his arrest:

> Q. When we came into the court, Ms. Plants was questioning you and she asked you whether or not she had ever talked to you before the exam and you said no; right?
>
> A. Right.
>
> Q. And only last week she spoke to you for a short period of time; right?
>
> A. Right.

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[33] P's Ex 4, pp 29-30.
[34] P's Ex 4, p 33.

Q. And at no time did she offer you any deals or immunity?

A. No.

Q. Did anyone else offer you any deals or immunity?

A. No.

Q. Officer McArthur, Sergeant Rechtzigel, no one offered you any deals of any kind?

A. No.[35]

This testimony was false, as respondent acknowledged in a subsequent *ex parte* conference with the judge.[36] The deception, and lying from the witness stand, continued throughout the remainder of Povish's testimony in responding to questions by counsel obviously designed to test Povish's assertion that he was not working with the police from the beginning. For example, when asked whether he was told he was under arrest for possession of 47 kilos of cocaine, Povish answered "yes," and this was perhaps literally true in that respondent had been advised that Povish was booked as part of a charade to keep his identity as informant confidential. However, the questions continued: When was the first time Povish had seen McArthur? (When Povish was pulled over - a lie, as respondent acknowledged to the judge later[37]); Did you know you were facing prison? Were you made aware of the penalty for possessing such an amount of cocaine? Were you afraid? (Yes; not sure, yes; yes, "in shock," "wondering what I got myself into"[38]). Defense counsel also elicited the fact that the police let Povish go, gave him the keys to his car (which had been transporting the drugs), and that Povish returned to the bar and took various items belonging to Aceval. And then, defense counsel asked Povish:

Q. Now, what did the police say after they cut you loose; have a nice day?

MS. PLANTS: I will object. It goes to hearsay.

THE COURT: Sounds like hearsay to me.

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[35] P's Ex 4, pp 48, 50.
[36] R's Ex B, p 2.
[37] P's Ex 4, p 50. R's Ex B, p 2.
[38] P's Ex 4, pp 50-55.

> MR. FEINBERG: I think it goes to whether or not he believed he was being offered any deals or promises.
>
> THE COURT: Well, after he left, he left.
>
> BY MR. FEINBERG:
>
> Q. As you left, did the police say, goodbye, have a good day or was it –
>
> A. They didn't say have a good day.
>
> Q. What did they say?
>
> A. I don't know what they said. When they said I could go, I just went.
>
> Q. Did you think you would be called in as a witness later on?
>
> A. I didn't know what was going to happen.
>
> Q. They didn't say they might need you as a witness?
>
> A. I don't recall anything. When they said I could go, that's the only thing I heard.[39]

In fact, as respondent admitted to the judge in the second *ex parte* conference, Povish's statements that "he doesn't remember what was said to him by Mac" were untrue: "When he was interviewed at the police department there [were] discussions about what a good job he had done and so that was not exactly the truth."[40]

The false testimony continued unabated as defense counsel asked Povish whether he believed, until just a few moments ago, he would potentially be charged for his involvement in events of March 11, 2005, and respondent answered in the affirmative. Povish was then asked:

> Q. If you thought you were going to be charged with a crime, why wouldn't you get a lawyer?
>
> MS. PLANTS: Objection.

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[39] P's Ex 4, pp 64-65.
[40] R's Ex, p 2.

A. Couldn't afford one.

Q. You could not afford an attorney?

A. Nope.

Q. Do you own your own home?

MS. PLANTS: Judge, I'm going to object.

THE COURT: Sustained.

MR. FEINBERG: Your Honor, he couldn't afford one. It goes to his credibility.

THE COURT: He went to court. He said when he got there he wasn't sure if he would be charged and he said he couldn't afford an attorney. If he hasn't been charged yet, I don't see why anyone would necessarily hire an attorney. They might or they might not. So I don't think that's a proper subject to question him on and I will sustain the objection. It's not relevant.

MR. FEINBERG: He didn't say that he didn't hire an attorney because he didn't think he needed to. He said he couldn't afford one.

THE COURT: I didn't say he said that. I didn't say he said that. I just said a person might or might not decide to hire an attorney. He didn't say that. I did.

MR. FEINBERG: I don't believe, and if you say that, I would say there is no one in the world who thinks they are going to be charged with 47 kilos wouldn't contact an attorney.

MS. PLANTS: Oh, Judge –[41]

The cross-examination continued and Povish denied once again knowing that he would be involved in criminal activity or that there would be cocaine present.[42] After a brief re-direct examination by respondent, a re-cross examination of Povish was conducted, which ended as follows:

Q. Was this your operation?

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[41] P's Ex 4, pp 68-70.
[42] P's Ex 4, pp 71-72.

A. What are you talking about?

Q. Was the 47 kilo cocaine deal your deal?

A. No, it wasn't my deal.

Q. You're out. It wasn't your deal, you didn't make up the whole thing about you didn't know anything [sic]?

MS. PLANTS: Judge, I'm going to object.

A. What are you saying?

MS. PLANTS: This is beyond redirect.

THE COURT: This is certainly beyond redirect. Sustained. And the jury will disregard.

MR. FEINBERG: I have no further questions.[43]

3. September 19, 2005 Trial Proceedings & Closing Argument in *Pena*.

The next transcript of the trial proceedings admitted into evidence is that of September 19, 2005, which reflects that Officer MacArthur, continuing testimony from a previous day, was asked why the order was given to stop the vehicles before they arrived at their ultimate destination, which drew an objection by respondent that was sustained by the judge. Defense counsel then pursued a related point:

MR. FEINBERG:

Q. Did you ever find out where it was supposed to go?

A. I don't think I should answer that right now. We are still looking into the investigation part of it.

Q. Still being investigated?

A. Yes, sir.

Q. Had you allowed the vehicle to continue going where it was going to end up, you would have found out that night where it was going?

A. It's possible.[44]

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[43] P's Ex 4, pp 82-83.
[44] P's Ex 7, pp 11-12.

This testimony relates to a second *ex parte* conference between respondent and the trial judge, discussed below, in which respondent states that McArthur was in constant communication with Povish and knew where the cars and cocaine were going.

Closing arguments to the Pena jury were held on the afternoon of September 19, 2005. Respondent referenced Chad Povish's testimony to corroborate various points, such as the fact that he heard work being done on a machine in which the drugs were transported from Texas, and that Aceval had sent him to the store to buy duffel bags

In her closing argument to the *Pena* jury, respondent stated:

> Now we know there are actually two more: Chad Povish and Bryan Hill. They are part of that. They were the dummies who were stupid enough to be the carriers, the mules, on March 11. Bryan Hill set it up, acted as the pimp for his friend. Chad Povish was stupid enough to go along. They may not have known exactly what was in the duffel bags but they knew they were getting involved in something illegal. They knew it. All those five people were connected to the dope and they were connected to the delivery.
>
> Ladies and gentlemen, God bless Chad Povish and Bryan Hill. They gave us enough information so that we could try Mr. Pena, but they didn't want to give enough information to totally implicate themselves.[45]

This argument plainly camouflaged Povish's actual role as a confidential informant. He did not "go along" out of stupidity, and he was not concerned that his statements would implicate him.

4. Second *Ex Parte* Conference With the Judge.

Following the closing argument to the *Pena* jury, in the afternoon of September 19, 2005, respondent had another *ex parte* conference with Judge Waterstone, during which she made a record of Povish's perjury on September 15, 2005, when he was asked by defense counsel whether he had been offered any deals and denied it:

> MS. PLANTS: With regard to Chad Povish's testimony, he was asked whether he had been offered any sort of deals or immunity. He said no. He obviously was offered a deal because he's the confidential informant.[46]

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[45] P's Ex 7, p 79.

[46] Respondent's Exhibit (R's Ex) B – transcript of September 19, 2005, "Bench Conference," p 2.

That and another false statement have been addressed briefly in this opinion above; the second false statement from Povish was that he didn't remember what the police said when releasing him when, in fact, McArthur told him he had done a good job in his role in the transaction and arrest. Respondent also disclosed perjury by Officer McArthur, specifically, that he had no information about the transporting of the cocaine. In truth, "He was in constant communication with the confidential informant and so he knew what directions they were going in."[47]

Respondent did not mention other false statements, such as the perjured testimony she elicited from Sergeant Rechtzigel, or the false premise of her question to him about later discovery of Povish's identity. Of course, the judge had to have been aware of that perjured testimony, and the deceptive nature of the closing argument, since she was presiding over the trial. As respondent testified below: "I should say she knew those were lies, she was giving me looks at the time because . . . the judge and I both knew, and I looked at her and she looked at me, so I did what I thought was best at the time."[48]

Respondent stated to the judge that the false testimony was offered "with the intent to conceal [Povish's] identity." The second *ex parte* bench conference concluded with the following comments:

> [Respondent, Ms. Plants]: Clearly [Officer McArthur] testified that way to keep the identity [of Povish] secret.
>
> THE COURT: To protect his life, I'm sure.
>
> MS. PLANTS: Yes. So that's my sealed record of the day.
>
> THE COURT: Okay.
>
> MS. PLANTS: Thank you, Judge.[49]

5. Closing Argument to the *Aceval* Jury.

The next day, September 20, 2005, respondent gave her closing argument to the *Aceval* jury. She retraced Povish's role as helper to Bryan Hill (who worked in Aceval's bar but did not have a driver's license) and summarized some of his testimony. Then, respondent argued:

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[47] *Id.*
[48] Tr, p 72.
[49] R's Ex B, pp 2-3.

> Ladies and gentlemen, we have Chad Povish who works three jobs. He works as a personal trainer, he works as a carpet layer and he does car detailing. This is a hard-working young man who told you that, when he was in trouble, he knew he was in trouble but could not afford an attorney. Doesn't seem likely that is the kind of person who can afford to buy 47 kilos of cocaine. Clearly he and Brian [sic] are not the masterminds behind this. Alex Aceval was the one directing all of the activity that day.[50]

This statement is false and misleading in two ways. First, it leaves out a source of income (Povish's remuneration by the police). This was the obvious subject of argument of counsel and false statements by Povish denying that he had other sources of income. Allowing this testimony to stand uncorrected is misconduct. Arguing it to the jury is significantly aggravating in our view. The second way in which this argument misleads the jury is by telling the jury the outright falsehood that Povish "knew he was in trouble but could not afford an attorney." In reality, Povish was not worried about being charged. And respondent took an opportunity to prop up Povish's credibility (in denying involvement with the police) which was damaged by questions about why he was let go after a short period, why he was given the keys to his car, and why he had not hired an attorney when found with an enormous quantity of cocaine.

Aceval was charged with, among other things, conspiracy to deliver cocaine, and respondent argued to the jury that Bryan Hill and Chad Povish were involved, "[t]hey were the mules, they were the dummies that day who were going to physically transport the dope," and she continued:

> Chad and Brian [sic] are involved in this. They weren't charged in this case. They were [sic] given immunity until they got in the middle of their testimony. Brian got in the middle [sic] and Chad before him. They weren't charged because we have a big picture to look at here. Do you want the big dopers, the people who are bringing up multi kilos from Texas to the Detroit area or do you want the kids that are too stupid to know they should not be involved? It's a judgment call. That's why they're witnesses so that we can have a case against Mr. Aceval.[51]

There was no judgment call here, no decision by the police offer a conspirator a deal for cooperation and testimony against co-conspirators after he or she has been caught red-handed. This

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[50] P's Ex 5, p 11.
[51] P's Ex 5, pp 13-14.

was a case in which Povish was working for the police as an informant who led the police to the illicit transaction. He had no exposure, and he certainly had his deal well before "the middle of [his] testimony."

Defense counsel, in closing argument, raised the following topic which was met with an objection by respondent:

> The government has the power to bring in certain evidence and to withhold certain evidence. And therefore tell you that –
> MS. PLANTS: Judge, I'm going to object. I don't have the opportunity to withhold. Under the law I have to turn over all evidence to the defense. I would lose my job, I would lose my ability to practice as a lawyer. This would be a mistrial if I withheld evidence. So I object to that statement that I withhold anything.[52]

Defense counsel also raised questions about how the officers knew drugs were being transported to the bar, and argued that respondent "could have brought [the CI] in if she wanted to."[53] Respondent answered, in rebuttal:

> The CI, confidential informant. That means we don't get to know who they are. They are confidential. And he said and I could and can bring him in to testify. Do you know what? I could and can go to his funeral too. . . . [The CI's] life is at stake. ... I'm not going to bring him or her before you because, you know what?... It doesn't matter if [the information provided by the CI to the police] was true or not.[54]

F. Post-trial Developments.

Pena was convicted, and Aceval's jury could not reach a verdict.[55] During appellate proceedings in *Pena*, the Wayne County Prosecutor's Office confessed error, and respondent describes the error as follows: "That Mr. Povish's ID as the confidential informant did not come out."[56] Pena's conviction was set aside, and he pled to reduced charges in exchange for his testimony against Aceval in Aceval's re-trial.[57] In March 2006, prior to the retrial, respondent called Aceval's

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[52] P's Ex 5, pp 17-18.
[53] P's Ex 5, p 21.
[54] P's Ex 5, pp 44-45. Emphasis added.
[55] Tr, p 85.
[56] Tr, p 87.
[57] Tr, p 86.

attorney and disclosed the identity of the confidential informant at the direction of, or upon the advice of, Mr. Baughman, head of the appellate department in her office.[58]

Thereafter, respondent's actions came to light. Respondent testified that she and two officers were charged with conspiracy to suborn perjury, that Judge Waterstone was charged with misconduct in office, and that respondent ultimately pled guilty to misconduct in office.[59] In the disciplinary hearing before the panel, respondent candidly and forthrightly admitted her misconduct. She also acknowledged that she should have insisted that her witnesses not lie to the jury, and, in fact, should have pursued available options other than offering perjured testimony to the finder of fact, such as having the federal authorities prosecute the matter (because they can offer witness protection) or consulting with Povish about whether he was willing to testify openly about his role as a confidential informant (when she did do this prior to re-trial of Aceval, Povish took the option of disclosure of his identity).

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[58] Tr, p 93-94 ("Tim Baughman reconsidered and said that I had to let the defense know who the confidential informant was. Mr. Warren Harris was the defense attorney for Mr. Aceval at the time, and I called him up and I told him.")

[59] Tr, pp 88-89.