STATE OF MICHIGAN

Attorney Discipline Board

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ATTORNEY DISCIPLINE BOARD
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Grievance Administrator,

Petitioner/Appellant

v

Gregory A. Mikat, P 55735,

Respondent/Appellee

Case No. 09-56-GA

Decided: September 10, 2010

Appearances:

Cynthia C. Bullington, for the Grievance Administrator, Petitioner/Appellant
Gregory A. Mikat, In Pro Per, Respondent/Appellee

BOARD OPINION

While representing the defendant/husband in a domestic relations matter in Genesee County, respondent, Gregory A. Mikat, engaged in a sexual relationship with his client's wife. Genesee County Hearing Panel #3 found that respondent's conduct violated provisions of the Michigan Rules of Professional Conduct (MRPC), including MRPC 1.7(b) [representing a client if the representation is materially limited by the lawyer's own interests]; MRPC 1.16(d) [failure to return an unearned fee]; MRPC 4.2 [communication with a party represented by another lawyer without obtaining the other lawyer's knowledge or consent]; and MRPC 8.4(c) [conduct prejudicial to the administration of justice]. The hearing panel ordered a suspension of respondent's license to practice law in Michigan for a period of 179 days and ordered that respondent enter into a two year monitoring agreement with the State Bar of Michigan's Lawyers and Judges Assistance Program (LJAP). The panel also ordered respondent to make restitution to his former client in the amount of $1,500.00.

The Grievance Administrator has petitioned for review and the Attorney Discipline Board has conducted review proceedings in accordance with MCR 9.118.[1] For the reasons discussed below, discipline in this case is increased to a suspension of three years. Restitution to be paid to respondent's former client is increased to $5,000.00.

Panel Proceedings

In answer to the formal complaint filed June 19, 2009, respondent Mikat admitted many, although not all, of the factual allegations in the complaint, including the allegations that while representing the husband in an action for separate maintenance filed against his client, and while the opposing spouse was represented by counsel, respondent commenced a sexual relationship with his client's wife. Respondent also admitted that when his client came to him to seek advice regarding his suspicion that his wife was engaged in an extra-martial affair, respondent failed to disclose his firsthand knowledge of that affair. In his answer, respondent generally denied that he had engaged in a conflict of interest, that he had failed to return unearned fees to his client or that he had communicated improperly with a party whom he knew to be represented by another lawyer. At that time, respondent asserted an affirmative defense, suggesting that an order of probation under MCR 9.121(C) would be appropriate in light of the mitigating effect of a claimed addiction to alcohol at the time the misconduct occurred.

At the public hearing conducted by the hearing panel, respondent offered a plea of no contest to all of the factual allegations in the formal complaint, as well as to the charged violations under the Michigan Court Rules and the Michigan Rules of Professional Conduct. These included the charges that he failed to seek the reasonable objectives of his client [MRPC 1.2(a)]; engaged in a conflict of interest [MRPC 1.7(b)]; failed to refund an unearned fee [MRPC 1.16(d)]; communicated with an opposing party represented by counsel without authorization [MRPC 4.2]; and failed to disclose to his client that he was having sexual relations with his client's wife, thereby engaging in conduct involving dishonesty, fraud, deceit, and misrepresentation.

[1] Respondent did not file a brief contesting the Grievance Administrator's request for increased discipline nor did he appear at the review hearing conducted by the Board on March 17, 2010.

The focus of the hearing then turned to the appropriate sanction and the parties were given an opportunity to present evidence of aggravating and mitigating factors bearing upon the appropriate level of discipline. The Grievance Administrator presented testimony from respondent's former client. He explained that his wife had filed an action for separate maintenance and that he retained respondent's services with a payment of $1,500.00. He recounted for the panel how text messages on his wife's telephone led him to believe that she was having an affair. He then went to respondent's office for advice and counsel:

> A. . . . And when I do contact him I go in there the Monday, and I honestly thought it was - 'cause she cleaned for the city of Fenton, I thought it was a fireman at the fire hall. And I'm sitting with him for an hour explaining to him how I can't believe she's having an affair and that I think it's the fireman, and he's looking me right in the face, I'm in tears crying to him, you know, 'cause I never thought that she would have an affair on me, and here he's right in front of me, he's the guy that's having an affair with my wife.
>
> . . .
>
> Q. What's he saying to you?
>
> A. Nothing. He didn't say nothing. He didn't seem to even care I was there. [11/04/09 Tr, pp 43-44.]

The client told the panel why he thought that respondent's actions resulted in his eventual divorce:

> Because we were trying to work things out. I mean we were trying to work things out, and from -again, I guess I can't repeat what my ex-wife said because its hearsay, but I just feel that he - he was a predator, that's the easiest way I can put it. He was going against - you know, she was going through a divorce and he took advantage of the situation, and that's just how I feel what he did, and fed her whatever he fed her to push her further away from me and have the affair. [11/04/09 Tr, p 47.]

The Grievance Administrator also presented testimony from the attorney who subsequently represented the client when he came to her with his suspicions that his lawyer was having inappropriate communications with his wife. Counsel advised the client to hire a private investigator and she testified that her fees, which were in excess of $16,000.00, were primarily a consequence

of respondent's inappropriate relationship with his client's spouse. She also testified that she was present at a meeting with respondent at which the client demanded a refund of the attorney fees he had paid to respondent but the respondent refused, stating that he had worked on the case and had earned his fees (11/04/09 Tr, p 16.) Finally, successor counsel was asked to comment on the harm to the client resulting from respondent's conduct:

> When he saw the phone records and then I determined that there was a relationship going on, I mean his whole - the foundation fell from his feet. He didn't know if his kids - if he agreed to some type of joint custodial arrangement and gave the kids over to her whether or not the kids would be safe with her. She didn't deny the relationship, neither did Mr. Mikat.
>
> I mean it's - I think its more psychologically affected [the client] than anything else . . . I don't know if he'll ever get over this. [11/04/09 Tr, p 22.]

Finally, the Administrator called respondent, Gregory Mikat, as a witness. He acknowledged commencing a relationship with his client's spouse while he was representing his client in the separate maintenance action. Questioned about the occasion when his client came to him with the discovery that the client's wife was having an affair, respondent told the panel:

> A. I don't remember exactly what I said. I remember feeling very awkward about it. In hindsight maybe I - well, I guess not maybe. In hindsight I should have revealed the relationship sooner and withdrawn from the case. From the very beginning when it became apparent that [she] and I had some interest in each other I recall thinking that this is just not realistic, and I did say to her on several occasions, you know, I'm going to have to bow out of this case.
>
> Q. Well, why didn't you?
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> A. Well, to be honest, it was very awkward, and it's one of those things I just wasn't sure how to bring it up or when to bring it up. Things had gone quiet in the case . . .
>
> . . .
>
> I don't know. In hindsight I should have. That would have been a better way to handle this. At the time I don't know

> what I was thinking. Nothing really was happening with the case. I was hoping somehow I would -- [the client] would want another lawyer or something or I could quietly bow out of the case and not be involved in it any longer.
>
> I did - I did - I remember thinking it would not be realistic, I can't go to court representing [the client], and I mean it's not as though - strike that. I just - I remember thinking that it was simply unrealistic. If there were some action, some motion or something that was pending I think that would have helped me to solidify in my mind what steps to take and to take them sooner rather than later. [11/04/09 Tr, pp 66-68.]

Respondent presented testimony to the panel regarding his alcohol use, his subsequent treatment and his participation in Alcoholics Anonymous. He explained to the panel that he had made a lot of bad decisions while he was drinking (11/04/09 Tr, p 75); that he didn't believe at the time that he "had the presence of mind to fully appreciate the seriousness of that particular relationship," and that he would not have continued the relationship with his client's wife if he thought that was a chance that she and his client could reconcile (11/04/09 Tr, p 77). By way of apology he addressed his former client:

> I apologize . . . Rightly or wrongly I wish I could apologize to [the former spouse] too because I think I may have hurt her more, most of all. [11/04/09 Tr, p 79.]

In closing, the Administrator's counsel advised the panel that the Attorney Grievance Commission was requesting a suspension of 180 days to be accompanied by restitution to the former client of the attorney fee of $1,500.00. In his closing remarks, respondent expressed a willingness to make restitution of the $1,500.00 attorney fee and requested that any suspension imposed by the panel should be less than 180 days.[2]

In its report, the panel found that respondent's conflict of interest, i.e. the conflict between his own interests and those of his client as prohibited under MRPC 1.7(b), falls under Standard 4.32 of the American Bar Association's Standards for Imposing Lawyer Sanctions which states that, absent aggravating or mitigating circumstances:

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[2] At the hearing level, neither the respondent nor the Administrator's counsel made reference to the Amercial Bar Association's Standards for Imposing Lawyer Sanctions, or other authority, in support of their respective requests.

> Suspension is generally appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client.

The panel noted the aggravating effect of respondent's selfish motive [Standard 9.22(b)], as well as the mitigating factors of lack of prior discipline [Standard 9.32(a)]; recognition and treatment for alcohol dependency [Standard 9.32(i)]; continued rehabilitation [Standard 9.32(k)]; and a generally cooperative attitude toward the proceedings [Standard 9.32(e)]. The panel noted that "respondent's own personal problems, which he is now attempting to deal with, blinded him to his professional obligation and prevented him from fully coming to grips with his misconduct."

The panel concluded that a suspension of 179 days[3] would adequately reflect the seriousness of respondent's misconduct. The panel ordered that respondent attend an ethics workshop conducted by the State Bar of Michigan; that he should enter into an arrangement for supervision by the State Bar's Lawyers and Judges Assistance Program for a period of two years; and that he pay restitution to his former client in the amount of $1,500.00, plus interest.

Discussion

In this petition for review, the Grievance Administrator now requests that discipline in this case be increased to revocation. Specifically, the Administrator argues that revocation, rather than suspension, is appropriate under ABA Standard 4.31(a). Under ABA Standard 4.31(a), disbarment [revocation] is generally appropriate when a lawyer, without the informed consent of a client "engages in representation of a client knowing that the lawyer's interests are adverse to the client's with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to the client."

Alternatively, the Administrator cites ABA Standard 6.32 which states that suspension is generally appropriate when a lawyer engages in communication with an individual in the legal system "when the lawyer knows that such communication is improper, and causes injury or potential injury to a party or causes interference or potential interference with the outcome of the legal proceeding.

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[3] Under Michigan Court Rule 9.123, a suspension for 179 days or less may ordinarily be terminated by the filing of an affidavit of compliance while a suspension of 180 days or more remains in effect until the suspended lawyer has completed a more rigorous reinstatement process which includes an investigation by the Grievance Administrator and the lawyer's appearance before a hearing panel.

Finally, the Grievance Administrator argues to the Board that the discipline imposed by the hearing panel is clearly insufficient and the discipline should be increased to revocation of respondent's license, arguing that the Board has ruled previously that "certain types of misconduct, by their very nature, reflect adversely on a lawyer's fundamental honesty or integrity to the extent that public protection demands further inquiry into that individual's fitness to practice law during reinstatement proceedings." *Grievance Administrator v Eugene Williams*, Case No. 98-203-GA (ADB 2000), citing *Grievance Administrator v Peter E. O'Rourke*, Case No. 93-191-GA (ADB 1995).

In *Grievance Administrator v Eugene Williams*, the Board affirmed a hearing panel's decision to impose a 180 day suspension for a lawyer who had induced his client to perform a sexual act while he visited her in the attorney visiting room at a county jail. In *Grievance Administrator v. Peter E. O'Rourke*, the Board increased discipline from a reprimand to a suspension of 180 days based upon evidence that respondent had engaged in improper physical contact with a minor in the locker room of a local yacht club under conditions described as conduct contrary to "justice, ethics, honesty, or good morals."

While these prior Board opinions involved sexually related conduct for which the Board determined that reinstatement proceedings were required, the cases cited do not suggest that revocation is necessarily the expected result in such cases. Nevertheless, we agree generally with the Grievance Administrator's argument that not only should respondent be required to establish fitness as a lawyer before he regains the privilege of engaging in the practice of law, but that the length of his suspension should be substantially increased.

Following the analysis required under *Grievance Administrator v Albert Lopatin*, 462 Mich 235, 238, 612 NW2d 120, 123 (2000), we have considered (a) the duty violated, in this case respondent's duty to his client; (b) respondent's mental state (intentional, knowing or negligent); and (c) the actual or potential injury caused by the lawyer's misconduct. The result of this analysis leads to ABA Standard 4.1 and a comparison between the generally appropriate sanctions in ABA Standard 4.31(a) (disbarment) and Standard 4.32 (suspension). As noted above, Standard 4.31(a) states:

> 4.31 Disbarment is generally appropriate when a lawyer, without the informed consent of client(s):

> (a) engages in representation of a client knowing that the lawyer's interests are adverse to the client's with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to the client . . .

That Standard is compared to ABA Standard 4.32:

> 4.32 Suspension is generally appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client.

Both Standards fall under the category of violations of duties owed to clients. Both Standards involve a finding that the lawyer knew of adverse or conflicting interests. The difference between the application of the two Standards in this case, therefore turns on whether or not respondent acted with "intent" to benefit himself and whether or not the injury or potential injury to his client may be characterized as "serious."

The answer to the second question is easily found in the record. The testimony of respondent's former client, as well as the testimony of the client's subsequent counsel, clearly establish that respondent's client suffered serious psychological, and financial, injury as a result of respondent's conduct; indeed, the record paints a clear picture of a client who was emotionally devastated upon learning of his betrayal at the hands of his lawyer.

On the first question, however, we harbor some doubt as to whether there is sufficient evidentiary support for a finding that respondent acted with deliberate intent as that concept is used in Standard 4.31. Respondent testified to the panel that he knew that embarking on a relationship with his client's spouse was "not realistic" and that it was "very awkward," but, he added, "at the time I don't know what I was thinking." (Tr 11/04/09, pp 66-68.)

Under the definitions which accompany the ABA Standards, "intent" is described as the conscious objective or purpose to accomplish a particular result while "'knowledge' is the conscious awareness of the nature or the attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result." Under those definitions, the record more accurately describes an individual who "knew" that his conduct was wildly inappropriate but did not act with a "conscious objective" to achieve a particular result. For that reason, we stop short of finding that a sanction analysis in this case under the ABA Standards must result in an assumption that disbarment would be generally appropriate absent aggravating or mitigating circumstances.

As noted earlier, prior decisions of the Board cited in the Administrator's brief do stand for the proposition that certain misconduct must generally result in a suspension of sufficient length, i.e., 180 days or more, to trigger the reinstatement requirements of MCR 9.123(B). That is clearly the case here. Discipline for misconduct is not intended as punishment for wrongdoing, but for the protection of the public, the courts, and the legal profession. MCR 9.105. As the Board said in *Grievance Administrator v Peter E. O'Rourke*, 93-191-GA (ADB 1995) (affirming a suspension of 180 days based upon a finding that a respondent engaged in uninvited and non-consensual physical contact with a minor), certain types of misconduct, by their very nature, reflect adversely on certain fundamental obligations "that public protection demands further inquiry into that individual's fitness to practice law during reinstatement proceedings." *O'Rourke* at p 6. In *O'Rourke*, the Board spoke of the fundamental qualities of honesty or integrity that are demanded of all licensed attorneys. In this case, it is respondent's breach of the fundamental duty of loyalty to a client that requires, at a minimum, further re-examination of his fitness to return to the practice of law in a reinstatement proceeding under MCR 9.124.

Under ABA Standard 3.0, the final step in fashioning an appropriate sanction is the consideration of the aggravating and mitigating factors unique to that case. On review, we do not disagree with the panel's consideration of the mitigating factors of respondent's lack of a prior disciplinary history [Standard 9.32(a)]; his recognition and treatment for alcohol dependancy [Standard 9.32(i)]; his continued rehabilitation [Standard 9.32(k)]; and a generally cooperative attitude during this proceeding [Standard 9.32(e)].[4] We also agree that on the side of aggravation, respondent could be said to have acted with a selfish motive [Standard 9.22(b)].

However, the members of the Board are struck by two additional aggravating factors which appear to have been overlooked by the hearing panel. The first of these is the vulnerability of the victim of respondent's misconduct, his client. We need not take judicial notice that a client facing the dissolution of his or her marriage, with possible ramifications involving custody and visitation of minor children, are generally under great emotional pressure and will generally look to their attorney for support in this crisis point in their lives. The record in this case clearly establishes that this client was emotionally vulnerable, to the point of tearfully seeking advice and counsel from

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[4] It must be recognized, however, that respondent's failure to appear at the review hearing conducted by the Board, in violation of MCR 9.118(C)(1), or to otherwise participate in this proceeding following entry of the panel's decision essentially nullifies any mitigating effect under Standard 9.32(e).

respondent when he learned that his spouse was apparently having an affair with a then-unidentified man.

Even more disturbing, however, is respondent's apparent inability or refusal to acknowledge the wrongful nature of his conduct, an aggravating factor under ABA Standard 9.22(g). In reviewing the record before the panel, we are unable to point to any testimony by respondent evidencing a sincere appreciation of the extent of his disloyalty to his client. Indeed, at the conclusion of the panel proceeding, respondent directly addressed his former client, stating:

> I apologize . . . Rightly or wrongly I wish I could apologize to [your ex-wife] too because I think I may have hurt her more, most of all. [Tr, p 79.]

With this statement, respondent demonstrated yet again that the loyalty he should have owed to his former client was overshadowed by his feelings for his client's wife.

The extent and gravity of these two aggravating factors warrant, in our opinion, an increase in discipline to a suspension of three years.

The Board has also considered the issue of restitution which may be ordered as a condition of an order of discipline under MCR 9.106(5). In its order of discipline, the hearing panel below ordered respondent to return to the client the attorney fees which he had been paid in the amount of $1,500.00. At the conclusion of the panel proceedings, the Grievance Administrator's counsel emphasized that although the Grievance Administrator was not requesting further "consequential damages," such a request was being placed before the panel on behalf of the client.[5] These included the fees paid by the client to retain the services of a private investigator; fees for a psychological evaluation; fees paid to the client's subsequent attorney; and reimbursement for mileage and lost time from work. A similar request was presented to the Board at the hearing on the Grievance Administrator's petition for review with a representation to the Board that the client felt most strongly that he should be reimbursed for the $3,500.00 fee he paid for the services of a private investigator and $245.00 for out-of-pocket co-payments for counseling services. We conclude that the record establishes a direct connection between respondent's conduct and the investigator's fees of $3,500.00 paid by the client and we therefore increase restitution from $1,500.00 to $5,000.00.

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[5] For reasons that do not appear in the record, respondent's former client, although called as a witness, was not identified as the complainant in this case and did not address the panel on his own behalf.

Finally, the hearing panel's order would have allowed respondent's automatic reinstatement to the practice of law on the filing of an affidavit in accordance with MCR 9.123(A) but the panel attached conditions to the order requiring respondent to attend a State Bar of Michigan seminar on ethics and office management and that he participate in a two year monitoring agreement with the State Bar's Lawyers and Judges Assistance Program. Those conditions will not be included in the order for increased discipline. Questions regarding respondent's continuing rehabilitation will properly be addressed in a reinstatement proceeding under MCR 9.124, where respondent will have the burden of establishing his fitness to practice by clear and convincing evidence.

Board Members William J. Danhof; Thomas G. Kienbaum; Andrea L. Solak; James M. Cameron, Jr.; and Sylvia P. Whitmer concur in this decision.

Board Members William L. Matthews and Rosalind E. Griffin, M.D. did not participate.

Board Member Craig H. Lubben, joined by Carl E. Ver Beek dissents as follows:

I agree with the majority that the suspension imposed by the hearing panel was not sufficient in light of the respondent's conduct. I dissent from the majority opinion, however, because I believe that disbarment is the appropriate discipline under the facts of this case.

Mr. Mikat pled no contest to paragraph 19, subparagraphs (a) through (h) of the complaint. It was established that while representing his client in a divorce proceeding, Mr. Mikat became involved in a sexual relationship with the client's estranged wife - the adverse party in the proceeding. Mr. Mikat concealed the relationship from the client even when the client was seeking legal advice from Mr. Mikat about his suspicion of an affair and the potential impact of the affair on the divorce proceeding. The client incurred the cost of a private investigator and finally learned about Mr. Mikat's role in the affair. At that point, Mr. Mikat refused the client's demand for a refund of the attorneys fees which the client had paid.

The panel which heard this case acknowledged that in *Grievance Administrator v Lopatin*, 462 Mich 235; 612 NW2d 120 (2000), the Michigan Supreme Court held that in considering the appropriate level of discipline a panel should refer to the American Bar Association's *Standards for Imposing Lawyer Sanctions*. However, in my opinion, the panel missed the mark when it concluded that ABA Standard 4.32 rather than 4.31(a) applied.

Standard 4.32 states in part: "Suspension is generally appropriate when a lawyer knows of a conflict of interest and does not fully disclose to the client the possible effect of that conflict, and causes injury or potential injury to the client." By contrast, Standard 4.31(a) says in part: "Disbarment is generally appropriate when a lawyer, without the informed consent of client(s): (a) engages in representation of a client knowing that the lawyer's interests are adverse to the client's with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to a client."

Mr. Mikat's conduct fits within Standard 4.31(a). He continued representing the client after he began the sexual relationship with the client's estranged wife and failed to disclose it even when the client consulted with him about the client's suspicion that the wife was having an affair. In doing so, Mr. Mikat knew or should have known that his interests in: (1) maintaining for himself the benefits of the sexual relationship; and (2) protecting himself from the consequences of publicly disclosing what he had done were "adverse to" the client's interest in: (1) seeking reconciliation with the wife; (2) knowing about the estranged wife's affair; and (3) knowing of his lawyer's activities which might impair the lawyer's loyalty to the client. The decision to conceal the relationship was for Mr. Mikat's benefit. Finally, that decision caused serious or potentially serious injury to the client both in: (1) undermining the client's efforts at reconciling with his estranged wife; and (2) undermining the client's faith in lawyers and the legal system. As the client testified in part at page 48 of the transcript:

> I have no trust. I have no trust in the system. You know, I've never ever had to deal with anything through the law in my life, and I hired him as my attorney and expected him to represent me and he did everything but.

Under ABA Standard 4.31(a), the presumptive discipline is disbarment absent mitigating circumstances. We did not see sufficient mitigating factors in the record to warrant deviation from the presumptive discipline. To the contrary, Mr. Mikat testified at page 79 that he believed that he should apologize to his client's estranged wife because he "may have hurt her more, most of all." That testimony does not demonstrate to me a recognition of the duty that a lawyer owes to a client nor a recognition of the damage that Mr. Mikat has done. Accordingly, in my opinion, disbarment is the appropriate discipline in this case.

Board member Carl E. Ver Beek concurs in this dissenting opinion.