STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellant

v

Alexander H. Benson, P 43210,

Respondent/Appellee

Case No. 08-52-GA

Decided: February 12, 2010

Appearances:

Nancy R. Alberts, for Grievance Administrator, Petitioner/Appellant
Michael Alan Schwartz, for the Respondent/Appellee

BOARD OPINION

Following an emotionally charged courtroom confrontation with the opposing party in a civil case, respondent used his cell phone to call the opposing party, a lawyer. Receiving no answer, respondent left a recorded message which, while brief, was mocking, profane, and personally insulting. Neither the making of the phone call nor the contents of the recorded message were charged as professional misconduct in the discipline proceeding instituted by the Grievance Administrator. However, respondent pleaded no contest to the charges in the complaint that, when questioned about his actions, he filed a false affidavit and gave sworn testimony denying that he had made the phone call. Further, respondent pleaded no contest to the charge that he counseled his client to sign a false affidavit and to give false testimony to the court that it was the client, not respondent, who had made the call and left the recorded message. Finding that respondent's conduct was substantially caused by a psychological condition which had been diagnosed and for which respondent was undergoing treatment and medication, and that respondent otherwise met the criteria for probation under MCR 9.121(C), the hearing panel ordered that respondent be subject to probation for two years, with detailed conditions including the monitoring of respondent's activities by another lawyer and quarterly reporting from respondent's therapist.

This matter is before the Attorney Discipline Board for consideration of the Grievance Administrator's petition for review of the hearing panel's order. For the reasons discussed below, we vacate the panel's order of probation and order the suspension of respondent's license to practice law for a period of one year.

Panel Proceedings

In 2006, respondent filed a claim for damages on behalf of a client in Oakland County Circuit Court. The defendants in that case were a lawyer (Lawyer S.), as an individual, and the lawyer's professional corporation. By all accounts, the relationship between respondent and Lawyer S. was contentious. The attorney for the defendant in that litigation testified to the hearing panel that respondent and his client would provoke one another and that emotions sometimes got out of control. He described his own client, as "an emotional beast" and he observed that respondent "was too emotionally involved and, as they use the word today, civility, he had difficulty with that, I thought." (Tr 1/14/09, p 164). For his own part, respondent described the case as "the worst legal experience I have had in my life." (Tr 1/14/09, p 41).

Late in 2006, the case between respondent's client and Lawyer S. was settled. There remained, however, several outstanding motions, including a request for sanctions against respondent. Following a hearing on October 25, 2006, at which the court took the sanction request under advisement, Lawyer S. grabbed respondent's arm, exclaiming, "You fucking asshole, I finally got you." Enraged, respondent went to his car, made a phone call to Lawyer S. and left a voice message, "I made $40,000 off your fat ass - what a fucking treat - thank you for everything my man." (HP Report 4/15/09, p 4).

The hearing panel's report, filed April 14, 2009, observed:

> This message, however rude and crude, would not have had serious consequences except for [Lawyer S.'s] pending motion to impose sanctions and respondent's fear that his phone message would be used as evidence against him. Respondent, in accordance with his habit of trying to avoid embarrassment or humiliation at all costs, then lied to the court by affidavit and testimony, denying that he had left the message and conspired with his client by taking the position that the client had done it. Ultimately, respondent suffered the consequences of his folly by making a settlement in which he publically apologized in open court and paid [Lawyer S.] $75,000, even though it was probable the court would not grant sanctions in that amount, if at all. Following the hearing, both the judge and

> counsel for defendant reported respondent's misconduct. [HP Report 4/14/09, pp 4-5.]

In answer to the Grievance Administrator's formal complaint, respondent offered a plea of no contest to the charges of misconduct. The focus of the hearing before the panel was on respondent's request for probation under MCR 9.121(C), which allows a hearing panel, the Board, or the Supreme Court to place a respondent on probation for a period not to exceed two years. The panel must also specifically find that an order of probation is not contrary to the public interest. Additionally, respondent must assert in mitigation and thereafter demonstrate, by a preponderance of the evidence, that

> (a) during the period when the conduct which is the subject of the complaint occurred, his or her ability to practice law competently was materially impaired by physical or mental disability or by drug or alcohol addiction,
>
> (b) the impairment was the cause of or substantially contributed to that conduct,
>
> (c) the cause of the impairment is susceptible to treatment, and
>
> (d) he or she in good faith intends to undergo treatment, and submits a detailed plan for such treatment, the hearing panel, the board, or the Supreme Court may enter an order placing the respondent on probation for a specific period not to exceed 2 years if it specifically finds that an order of probation is not contrary to the public interest.

9.121(C)(3) further provides that a probation order issued under that rule may:

> (a) specify the treatment the respondent is to undergo,
>
> (b) require the respondent to practice law only under the direct supervision of other attorneys, or
>
> (c) include any other terms the evidence shows are likely to eliminate the impairment without subjecting the respondent's clients or the public to a substantial risk of harm because the respondent is permitted to continue to practice law during the probation period.

According to the testimony of Dr. Gerald A. Shiener, M.D., Psychiatrist, respondent suffers from major depression, a serious psychiatric illness that occurs in episodes and is characterized by feelings of hopelessness, sadness and powerlessness, and guilt and self blame, alternating with periods of impotent rage with disturbed sleep and changes in appetite. The expert testified that

respondent's condition can cause significant dysfunction and self-defeating behavior. Dr. Shiener testified that respondent manifested the symptoms of major depression at the time of his misconduct and that his illness was the cause of that misconduct. In its report, the panel stated,

> The record is replete with details of respondent's life history as they relate to the cause of his mental illness and the events leading up to and resulting in his misconduct as the attorney for the plaintiff in a civil litigation matter. This report will provide a general summary of those facts and will not attempt to set forth each one that might have been relevant and material to the panel's conclusions. This report will do likewise with respect to all the other testimony and evidence in the record.

Dr. Shiener concluded his testimony by opining that respondent was in "partial remission" although he still struggled with efforts to understand his actions and the consequences of his actions. He observed that as long as respondent was not facing adversity or confronting certain stressors in his professional and personal life, he would be capable of practicing law. (Tr 1/14/09, p 205). Asked by the panel what assurances he could give that the stress of litigation practice would not cause respondent to act inappropriately, Dr. Shiener testified,

> In terms of relative risk free, I ... can opine a good prognosis because I was able to formulate and see by history and by way of signs and symptoms that his behavior arose out of when he was in an attenuated state or suffering from an illness. There is a treatment for that illness and, from the times I have talked with him and the way he's responded to me, I'm encouraged that he can respond to treatment and that he can make use of the time that I spend with him to develop a sense of maturity or capacity for self-observation that is impaired when he is ill and an understanding of his illness to know that he needs to maintain himself in treatment, to continue with counseling and continue with medication. He seems willing to do that. [Tr 1/14/09, pp 232-233.]

Dr. Shiener was the only expert called to testify by either party and the Grievance Administrator presented no evidence in rebuttal.

The hearing panel filed its report and order on April 15, 2009, finding that the charges of misconduct in the complaint had been established by respondent's plea of no contest. As to the appropriate level of discipline, the panel noted that:

> In some respects, misconduct arising from mental illness is more difficult to deal with than misconduct carried out in a rationally controlled, deliberate manner, simply because the mentally ill person is not self-controlled and acts without understanding or being deterred by the consequences. As a result, any consideration of

> probation for respondent must be based on our confidence in the clear probability that a course of medical treatment and supervision of his professional responsibilities will result in his competent representation of clients and respectful observance of the Court Rules.

The panel noted frankly that it was "somewhat skeptical about a favorable outcome." However, the panel reported that while it would be tempting, and easier, to simply suspend respondent from the practice of law, respondent had met the burden of proof for establishing his eligibility for probation and that taking away his livelihood would be unduly punitive in light of his mental condition and his efforts to deal with those problems.

The panel therefore found that respondent was eligible for probation for a period of two years during which,

1. Respondent shall not make court appearances for two months;

2 Respondent is to meet with Dr. Shiener on a weekly basis for one year and then at intervals prescribed by Dr. Shiener for the second year. Respondent is to continue taking any prescribed medications;

3. Respondent is to sign waivers allowing Dr. Shiener to report to the Board and Grievance Administrator;

4. Dr. Shiener is to file quarterly reports to the Board and the Administrator for two years, including both positive and negative aspects of respondent's treatment;

5. Dr. Shiener is to promptly report respondent's failure to cooperate with the treatment regimen or any "doubt about respondent's ability to competently function as an attorney;"

6. A negative report from Dr. Shiener may trigger a hearing to determine whether or not respondent's probation should be terminated;

7. At the end of the two year probation, Dr. Shiener is to provide a report and opinion to the Board and the Administrator. The panel may consider termination of probation at that time or, if appropriate, a two year extension;

8. Probation order by the panel is subject to revocation if respondent fails to cooperate with Dr. Shiener;

9. Respondent's law partner is to monitor and review respondent's activities during the period of probation;

10. The monitor is to provide written quarterly reports to the Board and the Administrator and to report "any incident or course of conduct on respondent's part that raises doubts in the monitor's mind about respondent's competence to practice law, including his ethical behavior;"

11. The panel may consider termination of probation upon receipt of an unfavorable report from the monitor; and

12. The probation is to be vacated if respondent is found to have committed misconduct while on probation.

The Grievance Administrator has filed this petition for review on the grounds that respondent did not establish his eligibility for probation under the criteria listed in MCR 9.121(C)(1) and that, even if respondent was eligible for probation, the panel abused its discretion by granting probation in this case.

II. Discussion

The central question here - whether or not respondent should be placed on probation - is not an easy one and both parties are to be commended for the manner in which they have presented their respective positions to the Board. Respondent's misconduct is not in dispute. He admits that he left a crude, perhaps childish, phone message on another lawyer's answering machine and then tried to cover-up that fact by submitting false affidavits to the judge before whom a motion for sanctions was then pending. He also admits that he urged his client to submit a false affidavit and give false testimony to the court. Generally speaking, deliberately false statements to a tribunal will result in the most serious discipline. Standards 6.11 and 6.12 of the American Bar Association's Standards for Imposing Lawyer Sanctions states that, absent aggravating or mitigating circumstances,

> 6.11 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.

> 6.12 Suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the court . . . and takes no remedial action, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.

The Attorney Discipline Board and our Supreme Court have imposed discipline ranging from suspensions to disbarment for misconduct of this type. However, since its adoption in 1982, Michigan Court Rule 9.121(C) has allowed for the imposition of probation where a respondent has shown that an impairment caused or substantially contributed to his or her conduct and there has been a finding that probation would not be contrary to the public interest. In one of the first applications of this rule considered by the Attorney Discipline Board, the Board held that probation may be ordered in cases involving any type of misconduct. In that case, *Matter of Hugh J. McGuire*, ADB Case No. DP 146/81 (1983), probation was ordered in the case of an attorney who admitted the misappropriation of client funds but established to the panel's satisfaction that debilitating pain from arthritis affected his conduct and impaired his judgment.

The standard of review employed by the Board when either the Administrator or the respondent seeks modification or reversal of a hearing panel's findings is whether or not those findings have proper evidentiary support in the whole record, while at the same time allowing the Board a greater measure of discretion with regard to the ultimate conclusion. *Grievance Administrator v Irving August*, 438 Mich 296, 475 NW2d 256 (1991). That standard of review is the same if the question is whether the Grievance Administrator established misconduct by a preponderance of the evidence, or, as in this case, whether the respondent established eligibility for probation by clear and convincing evidence. In both instances, the Board should not presume to substitute its judgment for that of the hearing panel on questions involving credibility. In this case, neither the hearing panel nor the Board has been asked to weigh conflicting conclusions or opinions from competing experts. The respondent's expert, Dr. Shiener, was not challenged as to his expertise nor did the Grievance Administrator offer any expert evidence in rebuttal.

Applying the applicable standard of review in this case, we conclude that the hearing panel did not err in reaching its legal and factual conclusions that respondent was *eligible* for an order of probation under MCR 9.121(C). There is evidentiary support in the record for the panel's factual conclusions. As for the Grievance Administrator's argument that the hearing panel's discretion to order probation was not triggered in this case because respondent did not meet the threshold criteria

of MCR 9.121(C)(1)(a) requiring a showing that his "ability to practice law competently was materially impaired by mental disability," we are guided by a prior opinion of the Board, *Grievance Administrator v Alan M. Silver*, Case No. DP 9/83 (ADB 1984). In that case, the Board reversed a hearing panel's conclusion that the respondent had not established eligibility for probation under GCR 970.3(A)(4) [the predecessor to the current rule]. Addressing the hearing panel's finding on the degree to which a respondent's ability to practice competently must be shown to have been impaired, the Board held:

> The hearing panel questioned whether Respondent's psychological difficulties materially impaired his ability to practice law competently. The Panel did not find in the proofs a sufficient link between the psychological problems mentioned in the reports and Respondent's inability to carry out his duties as an attorney in a competent manner. However, the uncontroverted findings of the expert witnesses is adequate support for the averment that Respondent's misconduct grew ultimately from his destructive psychological cycle of overextension-stress-overcompensation.
>
> The Board, and only a few of its hearing panels, have had limited opportunities in which to make a complete and definitive construction of the language in this relatively new and untried probation court rule. Although it is clear in this case that Respondent's condition was serious enough to cause a material impairment, the Supreme Court, in promulgating Rule 970.3(a)(1), could not have intended the words "materially impaired by reasons of . . . mental disability" to be limited to cases of psychotic or near-psychotic disturbance. Indeed, attorneys who are so grossly debilitated that they cannot function should not be candidates for probation of any type but rather should be transferred to inactive status under GCR 1964, 970.1 or 970.2. Unlike the inactive status provisions (which refer to attorneys judicially declared incompetent, or involuntarily committed, or who remain incapacitated due to mental infirmity or disability), candidates for probation will generally suffer from a lesser degree of mental or psychological difficulty which can be treated without substantial continuing risk of professional misfeasance or malfeasance. Respondent's syndrome caused him to take on more work than he could handle, and then to make false representation to his client out of desperation. [*Grievance Administrator v Alan M. Silver*, ADB Case No. DP 9/83, p 2 of Attorney Discipline Board June 26, 1984, Opinion.]

We agree with respondent's counsel that, under the most narrow reading of the rule, no lawyer would ever qualify for probation under MCR 9.121(C)(1)(a) because if they were truly not

"competent" to engage in the practice of law, they should be transferred to inactive status under the non-disciplinary proceeding described in MCR 9.121(B).

Nevertheless, while we find support for the panel's conclusion that respondent established his *eligibility* for probation, we are compelled to vacate the order of probation and order the suspension of respondent's license. As noted above, the standard of review promulgated by the Supreme Court anticipates a certain level of deference to a hearing panel's factual findings where those findings have evidentiary support but recognizes that the Board possesses a greater measure of discretion with regard to the ultimate decision. *Grievance Administrator v August, supra.* See also, *Grievance Administrator v Eric S. Handy*, 95-51-GA; 95-89-GA (ADB 1996):

> Where the ultimate issue to be reviewed is the appropriate sanction, the Board's review is not limited to the question of whether there is proper evidentiary support for the panel's findings. In exercising its overview function on questions of discipline, the Board has a greater degree of discretion with regard to the ultimate result. [*Grievance Administrator v Handy*, p 3.]

In determining whether a respondent should be placed on probation, a hearing panel is not *required* to order probation if the respondent has otherwise established eligibility under the criteria in MCR 9.121(C)(1)(a)-(d). Rather, the hearing panel, the Board, or the Supreme Court "may" enter an order placing the respondent on probation "if it specifically finds that an order of probation is not contrary to the public interest."

Our exercise of discretion as to the question of whether or not this respondent should be placed on probation is similar in some respects to the exercise of discretion exhibited by the Board in one of the few, if not only, cases in which the Board has reversed a hearing panel order of probation. In *Grievance Administrator v Paul R. Jackman*, Case No. 189-87 (ADB 1990), the Board did not disturb the panel's findings that respondent Jackman was eligible for probation under MCR 9.121(C). However, in considering whether or not probation was contrary to the public interest, the Board ruled then that it must consider "its overriding duty to impose discipline in these cases in a way which is consistent with the duty to protect the public, the courts and the legal profession."

> To that end, we must also consider whether an order of probation will have a deterrent effect and whether other members of the legal profession and the public may draw some conclusion between the nature of an attorney's misconduct and the discipline imposed. This is especially true in cases involving the mishandling of funds entrusted to a lawyer. [*Jackman, supra*, p 3.]

The handling of client funds is certainly one area in which the public and the legal profession are entitled to know that lawyers will be held to the highest standards. The discipline system must

also carefully consider the message it sends when a lawyer has not only submitted false testimony to a tribunal but has enlisted the aid of a client in furtherance of that deception.

In weighing the question of whether or not the public interest will be safeguarded by allowing respondent to continue to practice, albeit under various supervisory safeguards, we have looked carefully at Dr. Shiener's testimony as well as the hearing panel's own conclusion:

> "Mr. Benson is still lost and struggles with efforts to understand his actions and the consequences of his actions. So there are still ongoing stressors and he is still depressed with a sense of hopelessness over those issues . . ." [Tr 01/14/09, p 203.]
>
> "As long as those stressors aren't there and as long as he is not facing adversity or some direct confrontation that brings up feelings of powerlessness . . . other than those situations and circumstances, his ability would be unimpaired. He would be capable." [Tr 01/14/09, p 205.]
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> "We are somewhat skeptical about a favorable outcome. Dr. Shiener's statement about treatment being very hard work because of 'his illness and personality structure' suggest that perhaps Mr. Benson is not constitutionally well suited to the stressors of a litigation practice . . . although he has begun treatment with Dr. Shiener, there is not yet sufficient evidence of progress to inspire confidence." [Panel Report, pp 6-7.]

Accepting these and other statements by respondent's expert witness and the hearing panel at face value, we are not assured that an order of probation would be in the public interest.

Turning to the appropriate level of discipline in this case, we noted above that Standard 6.11 of the American Bar Association's Standards for Imposing Lawyer Sanctions recommends that, absent aggravating or mitigating circumstances, disbarment is generally appropriate when a lawyer makes a false statement or submits a false document with a deliberate intent to deceive the court.[1] We also noted that the 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

[1] We believe that ABA Standard 6.1, dealing with false statements to a court, is the Standard most directly applicable to the facts of this case, rather than ABA Standard 5.1 which deals more generally with criminal or dishonest conduct evidencing a failure to maintain personal integrity.

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 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.

As we have explained at some length, we do not believe that an order of probation under MCR 9.121(C) is appropriate in this case. That does not mean, however, that the Board should not be able to give 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 in this case.

We have considered this as a significant mitigating factor, along with the imposition of other penalties or sanctions in the underlying civil action (Standard 9.32(k)) and respondent's remorse (Standard 9.32(l)). These factors, coupled with a recognition that respondent's behavior appears to be an aberration rather than part of a larger pattern of misconduct, is sufficient, in our view, to warrant the entry of an order suspending his license to practice law in Michigan for a period of one year.

Board members William J. Danhof, Andrea L. Solak, Carl E. Ver Beek, Craig H. Lubben and James M. Cameron, Jr., concur in this decision.

Board members William L. Matthews, C.P.A. and Rosalind E. Griffin, M.D., did not participate.

Board Vice Chairperson Thomas G. Kienbaum concurs separately:

I concur in the disposition of this case, but write separately to state my belief, earlier expressed in *Grievance Administrator v Carl Oosterhouse* , 07-93-GA (ADB 2008), that MCR 9.121(B) and (C) have little, if any, application to a case such as this.

Respondent in this case, by filing a false affidavit and inducing his client to do the same, unquestionably committed a felony, and perhaps two. Had he been charged and convicted (and given the uncontroverted record, if charged, he presumably would have been convicted), his conviction would have been filed with the Attorney Discipline Board and the Grievance

Administrator and pursuant to MCR 9.121(B), his license would have been automatically suspended. There is little doubt in my mind that, if the question of Respondent's discipline had come before a panel, he would have received at least a one year suspension, if not considerably more.

MCR 9.121 appears to be directed only at an attorney's impaired capacity in connection with his practice. Thus, MCR 9.121(B)(1), the predicate to sub-section (C), states:

> If it is alleged in a complaint by the Administrator that an attorney is incapacitated to continue the practice of law because of mental or physical infirmity or disability or because of addiction to drugs or intoxicants . . . .

Sub-section (C) is the mitigation provision, but it comes into play only if:

> . . . in response to a formal complaint filed under sub-Rule 9.115(B), the respondent asserts in mitigation and thereafter demonstrates . . .

I fail to see how this Rule could, either in logic or under statutory construction principles be applied to someone's criminal conduct. While the conduct in this case "related" to Respondent's practice in the sense that the false affidavits were submitted in connection with Plaintiff's appearance as a lawyer, it surely cannot be argued that submitting a false affidavit in an effort to avoid personal problems implicates incapacitation "to continue the practice of law because of mental . . . disability."

I applied *reductio ad absurdum* to support my concurrence in *Oosterhouse, supra*. It applies here as well.