STATE OF MICHIGAN

Attorney Discipline Board

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ATTORNEY DISCIPLINE BOARD

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Grievance Administrator,

Petitioner/Appellant,

v

Keith J. Mitan, P 33207,

Respondent/Appellee,

Case No. 06-74-GA

Decided: September 30, 2008

Appearances:
Patrick K. McGlinn, for Grievance Administrator
John L. Coté, for the Respondent (oral argument only); respondent in pro per on the brief

BOARD OPINION

Respondent was found by Tri-County Hearing Panel #57 to have violated the orders of a tribunal and to have testified dishonestly in circuit court proceedings. The hearing panel imposed a suspension of 60 days. The Grievance Administrator has petitioned for review seeking increased discipline. The respondent filed a cross-petition raising various claims of error and further arguing that the discipline imposed was too severe. We affirm the panel's findings of misconduct but order that respondent be suspended from the practice of law for one year.

Respondent was convicted of criminal contempt by the Ingham Circuit Court in August of 1999, along with his brother Kenneth in *Frandorson Properties v Keith Mitan*, et al, and *Keith Mitan, et al v Frandorson Properties*, Ingham County Circuit Court Case Nos. 94-78210-CH and 94-77994-CZ. Thereafter, respondent sought to appeal this conviction. Pursuant to the terms of his appeal bond and related court orders, he was required to submit a request for approval of travel plans should he wish to leave the State of Michigan. Between June 12 and June 15, 2003, respondent traveled to California, Arizona and Illinois without seeking and receiving written authorization from the Ingham Circuit Court. The hearing panel found that respondent's knowing violation of the court's orders constituted a violation of MRPC 3.4(c).

The evidence that respondent violated MRPC 3.4(c) by traveling to California without permission of the court is abundant. The Grievance Administrator called Roger Morgan as a witness in the hearing below. The panel report summarizes his testimony:

> Mr. Morgan testified that he is a real estate developer and real estate agent in California. In that capacity, he met with a potential buyer for a single family residence near San Diego, California. He testified that he showed the house to an individual identifying himself as John Smith. He testified that an escrow was opened on May 31, 2003 and a closing was scheduled for June 20, 2003. Prior to the closing, Mr. Morgan met Mr. Smith at the house again . . . . Mr. Morgan specifically testified that he met with Mr. Smith at the house in California on June 13, 2003 and that Mr. Smith introduced Mr. Morgan to Smith's brother "Keith." Mr. Morgan identified respondent, Keith Mitan, as the individual he met at the house in California on June 13, 2003 . . . . Mr. Morgan was then cross-examined by respondent with regard to his interactions with the "person that you claim was me." [HP Report, p 2; citations omitted.]

This evidence was unrebutted. Indeed, respondent introduced no evidence. He did, however, engage in insubstantial arguments before the panel and this Board on various points. There is proper evidentiary support for the panel's finding that respondent violated MRPC 3.4(c). *Grievance Administrator v John D. Baker*, 06-66-GA (ADB 2007); *Grievance Administrator v August*, 438 Mich 296, 304 (1991). The generally appropriate level of discipline for respondent's violation of MRPC 3.4(c) is a suspension. ABA Standard 6.22.[1]

In addition to finding that respondent knowingly violated the circuit court's order, the hearing panel found that respondent engaged in deceptive conduct before the court. At a hearing

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[1] The "Black Letter" of the ABA Standards sets forth Standard 6.22 thus:

> Suspension is generally appropriate when a lawyer knows that he or she is violating a court order or rule, and causes injury or potential injury to a client or a party, or causes interference or potential interference with a legal proceeding. [ABA Standards (1991, as amended), p 13.]

The Standards with commentary accompanying the black letter (Standards, pp 17-52) contains the following formulation of ABA Standard 6.22:

> Suspension is appropriate when a lawyer knowingly violates a court order or rule, and there is injury or potential injury to a client or a party, or interference or potential interference with a legal proceeding. [ABA Standards (1991, as amended), p 42.]

on a sentencing motion before Ingham Circuit Judge Giddings on June 17, 2003, just days after he returned from California, respondent testified under oath, in part, as follows:

> THE COURT: Okay, so all of these documents that I have reflecting a request by you to travel to California since April is - you've not traveled to California since April?
> THE WITNESS [Respondent]: I've not stayed at the Redondo-
> THE COURT: I draw an inference from that that in fact you did travel to California then.
> THE WITNESS: I'm not sure, your Honor. I don't know the exact dates. I don't have my -
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> * * *
>
> THE COURT: Can you say with some degree of certainty that you stayed - - traveled to California since March 1st of this year?
> THE WITNESS: Possibly.
>
> * * *
>
> THE COURT: Uh-huh. And you can't tell me here today the last time you traveled to California?
> MR. MITAN: [Respondent] I don't know the exact date, your Honor. I'd have to look in my schedule book.
> THE COURT: Do you have your schedule book here?
> MR. MITAN: No, I do not.
> (At 2:43 p.m., discussion between Mr. Mitan and Mr. Clarke)
> MR.MITAN: Your honor, the last time I was there, I stayed at the Super 8 motel, and that was sometime at least this year.
> MR. CLARKE: There's a January travel voucher for that, your Honor, on Culvert Boulevard or something.
> THE COURT: It's your testimony you've never traveled to California since January? [Further colloquy omitted.] [Ex 8 – Tr 6/17/03, pp 38-40, 54-55.]

Respondent never disabused the court of the notion that he had not been to California since January of that year, and respondent does not claim that he suffered from an illness or injury that impaired his memory such that he could not remember a trip only days before his representations to the court. Indeed, he gave the following answers to questions by a member of the hearing panel below:

> MEMBER RYAN: . . . If you had been in California on the 13th of June when the Judge asked you [at the June 17th hearing] where you stayed or what not, you would have been able to remember or recall where you had stayed four days ago, correct?
> MR. MITAN: I would think so.
> MEMBER RYAN: Pardon me?
> MR. MITAN: I guess. [Hearing Tr 3/27/07, p 89.]

In its misconduct findings on the record, the panel clearly found that respondent's conduct was prejudicial to the administration of justice. MCR 9.104(A)(1); MRPC 8.4(c). Although the findings on the record and the panel's written report are less than clear in other respects, the panel did find that respondent "made a false statement by omission," and was "intentionally evasive."

In its report on misconduct, the panel wrote:

> Having found that respondent was, in fact, in California on June 13, 2003, we can reach no other conclusion with regard to his testimony on June 17, 2003 but that respondent was evading the court's inquiry; that his statement to the court that he did not know when he had last been in California was not credible and was evasive. The panel finds that respondent engaged in conduct which, although not directly untruthful, was conduct that did not involve the full degree of candor to a tribunal required under our professional standards. [HP Report, p 4.]

The testimony that was "not directly untruthful" is specified elsewhere in the panel's report: "respondent did not unequivocally state under oath that he had not been out of the State of Michigan during the preceding week" (Report, p 5). The panel declined to find that respondent's statements amounted to perjury. It is not clear whether the panel believed that respondent knew precisely when he had been in California and lied when he said he needed to check his schedule book to answer. In the absence of a finding in this regard, we presume that it did not, and that the panel therefore did not find a violation of MRPC 3.3(a)(1). Clearly, however, the panel found that respondent intentionally withheld information from the court which was material to the questioning by the circuit judge. Respondent did more than "misspeak" or inadvertently mislead by characterizing facts too favorably to his position. Under the circumstances of this case, and in light of our review of the whole record, we conclude that the panel found that respondent's statements to the Ingham Circuit Court regarding his travel outside of the State of Michigan were in violation of MRPC 8.4(a) and (b), and MCR 9.104(A)(3), and we find proper evidentiary support for this finding. *Baker*, *supra*.

Applying the ABA Standards for Imposing Lawyer Sanctions as directed in *Grievance Administrator v Lopatin*, 462 Mich 235; 612 NW2d 120 (2000), the panel's report concluded that a suspension was the presumptively appropriate general level of discipline, and then announced that respondent would be suspended for 60 days. The Grievance Administrator argues that the panel

erred in applying Standard 6.12[2], and that the panel should have applied either Standard 6.11[3] or Standard 5.11(b)[4]. In the alternative, the Administrator argues for a suspension of significant length, citing *Grievance Administrator v Frederick B. Gold*, 99-35-GA (ADB 2002).

The Administrator conceded (to the panel and on review) that there was no actual injury to the parties or the proceeding because the judge denied respondent's motion and ordered him to serve the full 30-day sentence for contempt. We note also the judge's skepticism at the hearing about respondent's testimony regarding his out-of-state travel (see Ex 8, p 60). ABA Standard 6.1 does draw distinctions based on the extent to which the misrepresentation to the tribunal injured a party or caused a negative impact upon a proceeding, or had the potential to do either. Accordingly, while we agree with the Administrator that the injury caused when lawyers deceive courts may be conceived of in broader terms, we find no error in the panel's decision to apply Standard 6.12 instead of Standard 6.11 in this case.

Further, Standard 5.11(b) deals with dishonesty, generally. Standard 6.1 is expressly concerned with lawyer dishonesty in dealing with a court, and Standard 6.12 most closely fits the facts of this case. Therefore, we conclude that the panel did not err in applying Standard 6.12 instead of Standard 5.1.

Finally, we find that a recent case provides some guidance here. In *Gold, supra*, the respondent entered a plea of nolo contendere to two counts of assault and battery. The charges arose from acts of physical contact of a sexual nature with the complainant. During his sentencing, the

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[2] Standard 6.12 provides:

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

[3] 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.

[4] Standard 5.11(b) states:

Disbarment is generally appropriate 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.

respondent denied that he had previously been suspended from the practice of law for similar conduct. The panel found that he "made a false or misleading statement to a tribunal." On review, respondent Gold asserted that he simply responded to "the best of his recollection at the time." In upholding the panel's application of Standard 6.12, this Board increased a six month suspension to one year, noting that sufficient weight had not been given to the aggravating factors, specifically, prior similar misconduct.

Respondent's arguments, including, but not limited to, his contentions that the panel found uncharged misconduct, erred in striking AGC Counsel from the respondent's witness list, and erred in its quashal of respondent's subpoena to the Grievance Administrator, all lack merit.

For the reasons discussed above, we shall enter an order affirming the panel's order finding misconduct and modifying the discipline imposed so that respondent will be suspended from the practice of law for one year.

Board members Lori McAllister, George H. Lennon , Andrea L. Solak and Thomas G. Kienbaum concur in this decision.

Board Member William L. Matthews, C.P.A., concurs in this decision but would have imposed a suspension of two years.

Board members William J. Danhof, Billy Ben Baumann, M.D., and Hon. Richard F. Suhrheinrich did not participate.