STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellant,

v

Noel L. Lippman, P 16719,

Respondent/Appellee,

Case No. 04-120-GA

Decided: September 28, 2007

Appearances:

Frances A. Rosinski, for the Grievance Administrator, Petitioner/Appellant
Michael Alan Schwartz, for the Respondent/Appellee

BOARD OPINION

The hearing panel below adopted the finding and conclusions of a Special Master who found that respondent made a false statement of material fact to a tribunal; made knowing and intentional misrepresentations in an answer to a request for investigation; practiced law in areas of law in which he was not competent; failed to protect his clients' interest by failing to prepare and file qualified domestic relation orders; and neglected an immigration matter. The panel conducted separate hearings to determine the appropriate sanction and ordered that respondent be suspended for 90 days subject to the conditions that he obtain malpractice insurance in the amount of $500,000; that he attend a course in law office management; and that he engage a practice monitor to implement office management and case management procedures.

The Grievance Administrator has petitioned for review of the level of discipline and argues that respondent's misconduct, coupled with aggravating factors including an extensive history of prior misconduct, warrants revocation of respondent's license. Having conducted review proceedings in accordance with MCR 9.118, we conclude that discipline in this case should be

increased to a suspension of one year and until respondent has established his eligibility for reinstatement by clear and convincing evidence under the procedures described in MCR 9.123(B) and MCR 9.124.

I. Panel Proceedings

The Grievance Administrator filed a 10-count, 48-page complaint in this matter in September 2004. In view of the number of charges, the likely number of witnesses and the expected length and number of hearings required, the Attorney Discipline Board appointed Philip Green of Ann Arbor as a Special Master under the procedure described in MCR 9.117. The Master conducted evidentiary hearings on January 31, 2005, February 1, 2005, February 2, 2005, February 3, 2005, February 4, 2005, March 3, 2005, May 24, 2005, May 25, 2005, and June 22, 2005. During those proceedings, the Master dismissed several counts on respondent's motion and other counts were voluntarily withdrawn by the Grievance Administrator.

The Master's report was filed April 28, 2006. He concluded that professional misconduct was established in connection with four counts and that there was not a preponderance of evidence in support of the remaining counts. The Master's report is attached as a Appendix A.

After consideration of the written objections filed by the parties, the hearing panel adopted the Master's findings and conclusions of misconduct and ordered the scheduling of a separate hearing on discipline. Following that hearing on December 19, 2006, and after review of the extensive sanction briefs filed by the parties, the panel entered its order on April 3, 2007 (attached as Appendix B) suspending respondent's license for 90 days with conditions that include proof of malpractice insurance, an education requirement in office management, and consultation with a practice monitor.

II. Level of Discipline

The Grievance Administrator presents several arguments for the proposition that the hearing panel erred in its use of the ABA Standards. First, the Administrator argues the panel erroneously treated this as a case primarily involving neglect and lack of diligence as alleged in Counts Two, Three and Seven rather than as a case involving the more serious charges of making intentional misrepresentations to the Oakland County Circuit Court, the Michigan Court of Appeals and the

Grievance Administrator, as charged in Counts One and Two. Instead of concluding that suspension is generally appropriate when a lawyer knowingly fails to perform services for a client and causes injury or potential injury (ABA Standard 4.42(a)), the Administrator argues, the panel should have considered disbarment under Standard 5.1 [engaging in intentional conduct involving dishonesty, fraud, deceit, or misrepresentation] or Standard 6.1 [making a false statement to a court, with intent to deceive and causing significant or potentially significant adverse effect on the legal proceeding]. In that regard, the Administrator further argues that while the Master appropriately found that the respondent knew or should have known that his written statements to the Circuit Court and the Court of Appeals that his client had passed a polygraph examination were knowingly false, the panel improperly "undercut" that finding by adopting respondent's argument that he was, at worst, simply negligent when he repeated assertions previously made by his associate.

Secondly, the Grievance Administrator argues that the panel erred in its application of aggravating and mitigating factors in its analysis under the American Bar Association's Standards for Imposing Lawyer Sanctions ("the Standards"). Specifically, the Administrator argues that the panel "undervalued" aggravating factors as defined in Standard 9.22, including respondent's extensive history of prior misconduct and "overvalued" character reference letters submitted to the panel from judges and other lawyers. These arguments will be addressed in turn.

A. Did the panel erroneously overlook, or under-emphasize, intentional conduct by respondent with his regard to a false statement to a Circuit Court and the Court of Appeals that his client had passed a polygraph examination?

The Master found that respondent made a false statement of material fact to the Oakland County Circuit Court and the Court of Appeals by stating that his client, Daniel Palm, had passed a polygraph examination. (Paragraph 28(h) of the Complaint.) The Master's finding on this point appears at pages 8 and 9 of his report. The Master noted that respondent claimed, at the hearing, that this assertion was based on his recollection that his associate, Mr. Townley, had made the same statement about passing the polygraph exam at a summary disposition hearing. The Master essentially found that this testimony by respondent must have been false because no such representation was made by Mr. Townley at the summary disposition hearing.

Respondent argued to the panel - and now to the Board - that this conclusion by the Master was simply mistaken because Mr. Townley did make such a statement to Judge Mester during the motion for summary disposition which is in evidence as petitioner's Exhibit 16. That transcript exhibit dated May 26, 1999 shows that attorney Townley, stated to Judge Mester:

> Mr. Townley: The problem is here, your honor, I need a copy of those statements [from other employees] to indicate whether those events occurred. I had my client take a lie detector test in that regard to see whether he did or didn't. He - - that lie detector test indicated that he did not commit those types of actions. I needed that information from the defendant. [Exhibit 16, p 5, lines 13-18.]

Respondent argued to the panel - and now to the Board - that it must necessarily follow that if the Master was mistaken on this point, then his finding that respondent made a material misrepresentation in his pleadings to the Court of Appeals cannot stand.

On this fairly narrow point of whether a certain representation was made at a court hearing by respondent's associate, we hesitate to criticize the Master's finding, especially in light of the sheer volume of material presented in this case. In any event, we conclude that there was other evidence in the record which more strongly supports a finding that respondent did know that his client had not passed a polygraph examination and that his statements to the Circuit Court and Court of Appeals were, in fact, knowingly false.

Respondent Lippman gave his testimony to the Master in 2005. The record also includes respondent's answer to a request for investigation filed against him by Daniel Palm (Petitioner's Exhibit 60). This answer was prepared and signed by respondent in April 2001 - closer in time to the events in question, including the polygraph examination and the summary disposition hearing in Mr. Palm's case. With regard to the polygraph examination administered to Mr. Palm in 1999, respondent stated in his answer to the Grievance Administrator in 2001:

> [Mr. Palm] was informed by Mr. Townley and myself that possibly the best defense to the accusations was to take a polygraph and after passing the same we could provide the results to the defense attorneys to demonstrate that he was in fact telling the truth, as he had previously informed both myself and Mr. Townley. He was advised that it was his decision whether to take the test or not . . . <u>after taking</u>

> the test the examiner informed the office that Mr. Palm did not pass the initial test. A second test was performed and his reactions were not as significant to the relevant questions. The examiner informed us that this would indicate that he was becoming familiar with lying to the questions or there were other incidents in his past that were conflicting with the relevant questions. The polygraph expert stated that due to the varying nature of the results, he would indicate in his report that the "test" was inconclusive. The examiner felt that if Mr. Palm took the test with other examiners they might well conclude that based upon his responses that he failed the test.
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> At this time Mr. Palm again insisted to both Mr. Townley and myself that he was telling the truth. The polygraph examiner was wrong and that he was just to nervous when taking the test. He was demanding that we continue to pursue his case. [Petitioner's Exhibit 60, pp 2-3; emphasis added.]

Respondent's statement to the Grievance Administrator in April 2001 (Petitioner's Exhibit 60) creates a basis for a finding that respondent knew, contemporaneous with the polygraph examination in 1999, that his client, Mr. Palm, did not pass the test. In short, Petitioner's Exhibit 60 provides evidentiary support for the Master's finding that respondent knew that his client had not passed a polygraph examination, yet stated in pleadings to the Circuit Court and the Court of Appeals that his client had passed such an examination.

In its written findings of misconduct, the panel accepted the Master's findings and conclusions, including the Master's finding as to the deliberate nature of respondent's misrepresentation to the courts. Nevertheless, the Administrator argues, the panel seemingly adopted the argument of respondent's counsel at the sanction hearing that the Master made a mistake on this point. We conclude, however, that there was evidentiary support in the record for the Master's finding.

We agree with the Administrator that respondent's misleading statements in pleadings should be considered as more serious misconduct than his failure to provide services (such as failing to file a QDRO) for other clients. Thus, the Administrator argues, the panel should have considered the Standard for engaging in intentional conduct involving dishonesty or misrepresentation [Standard 5.1] or making misrepresentations to a court [Standard 6.1], rather than the Standard utilized by the

panel, Standard 4.42(a) [suspension generally appropriate when a lawyer knowingly fails to perform services for a client and causes injury or potential injury].

It does not necessarily follow, however, that the statements made by respondent with regard to the polygraph examination were automatically grounds for disbarment under Standards 5.11 or 6.11.[1] For example, the hearing panel's conclusion that the statements regarding the polygraph examination were not entirely material to the issues before the court is not without merit. Nevertheless, it should be beyond argument that deliberately false statements made in a written pleading to a tribunal should be considered serious misconduct and should have serious consequences.

For example, in *Grievance Administrator v David Raaflaub*, ADB No. 01-94-GA (2003) the Board increased discipline from a suspension of 180 days to a suspension of one year for an attorney who filed a rehearing motion with the Michigan Court of Appeals which contained statements about

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[1] Absent aggravating or mitigating circumstances, Standard 5.11 states:

> 5.11 Disbarment is generally appropriate when:
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> 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 lawyers fitness to practice.

Standard 6.11 states that, absent aggravating or mitigating circumstances:

> 6.11 Disbarment is generally appropriate when as 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.

the circuit judge and an assistant prosecutor which respondent knew to be false or were made with reckless disregard as to their truth or falsity. In that case, the Board affirmed the panel's finding that suspension was appropriate under ABA Standard 6.12 which states that suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the court where the material information is being improperly withheld.

Nor have we overlooked the fact that respondent was found to have made a false statement in his answer to a request for investigation. In a case cited by the Grievance Administrator, *Grievance Administrator v Rostash*, 457 Mich 289 (1998), the Supreme Court increased discipline from a 90 day suspension to 180 days. That case involved a charge that respondent aided and assisted an elected prosecutor in covering up the prosecutor's representation of parties in a civil matter, despite a conflict of interest, and agreed to share the eventual fee in the civil case with the prosecutor. In addition, the respondent in that matter was found to have made a material misrepresentation in his answer to the request for investigation in order to conceal his complicity with the prosecutor. As to the misrepresentation to the Grievance Administrator, the Court stated in its per curiam opinion:

> Here, the hearing panel determined that the respondent lied in his answer to the request for investigation. It was an obvious attempt to cover-up both his and [the prosecutor's] misconduct; the Grievance Administrator contends. Such false statements were made with the intent to benefit both men, and had the potential of causing serious injury to the public and the profession. [*Rostash*, *supra* at 295.[2]]

The Grievance Administrator has also called the Board's attention to its prior opinions in *Grievance Administrator v Mary Gerisch*, ADB Case No. 171-87; 197-87 (1988) and *Grievance Administrator v Scott Stermer*, ADB Case No. 01-3-JC (2003). In the *Gerisch* matter, the respondent failed to inform her client that his cause of action had been dismissed and she then manufactured a false settlement check and settlement statement in support of her claim to the client and the Grievance Administrator that the case had been settled. On review, the Board increased discipline

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[2] A fair reading of the Court's opinion in *Rostash*, however, leads to the conclusion that it was the respondent's involvement in the violation of the public trust which was sufficiently egregious to warrant the increased discipline to a suspension of 180 days, and not the finding that he made a misrepresentation in his answer to a request for investigation.

from a three year suspension to disbarment. In the *Scott Stermer* matter, the Board increased discipline from a three and a half year suspension to disbarment in the case of a lawyer who created a fake order of dismissal in a traffic matter, by cutting, pasting and copying a judge's signature from another order, and then presented the forged order to a second judge. In both *Gerisch* and *Stermer*, the Board emphasized that an attorney who creates forged pleadings or documents not only destroys the trust of the client but does incalculable harm to the legal system.

Inclusion of a single false statement in a pleading is not necessarily comparable to a lawyer's creation of an entirely false document, complete with forged signatures. The finding in the instant case, that respondent knowingly made a false statement of fact in an otherwise legitimate pleading is arguably more akin to the situation presented in *Grievance Administrator v Leonard Eston*, ADB Case No. DP 75/85 (1987). In that case, the Board affirmed a panel's finding that the respondent's neglect of a criminal appeal warranted a suspension of three months and that his knowingly false statements to a U.S. District Court Magistrate that he conducted legal research and drafted pleadings for his client prior to receiving a letter of discharge from the client warranted a suspension of one year.

B. Did the panel err in its application of aggravating and mitigating factors, i.e. did it "overvalue" the mitigating effect of letters from lawyers and judges, "undervalue" the aggravating effect of respondent's prior discipline, and overlook other aggravating factors?

1. Letters Submitted at the Sanction Hearing

At the sanction hearing, respondent introduced six letters expressing support for respondent from two circuit judges, two district judges, one prosecutor and one court administrator. All were from Lapeer County, where respondent practices. The Grievance Administrator cites a Florida opinion holding that character letters are not proper evidence in any court proceeding and "certainly should not be considered proper in a disciplinary proceeding." *Florida Bar v Prior*, 330 So2d 697 (FLA 1976). The Grievance Administrator urges a ruling that the Attorney Discipline Board should not condone a hearing panel's admission of letters in place of sworn testimony over the objections of any party. We decline the invitation to find that the panel placed an over-reliance on the character reference letters submitted in this case or that we adopt a hard and fast rule to exclude all letters if objected to by a party in future proceedings.

In his brief in support of petition for review, the Grievance Administrator asserts:

> Even assuming the character evidence was properly submitted with sworn testimony, the panel grossly overvalued it. [Grievance Administrator's Brief, May 31, 2007, p 21.]

We do not find a basis for that conclusory characterization in the hearing panel's report on discipline. In its report on discipline, the panel stated, "The panel also notes that the character and reputation of [sic] the legal community in which respondent practices is excellent." The balance of that paragraph summarizes the contents of the various letters:

> Correspondence submitted by two (2) 40th Judicial Circuit Court (Lapeer County) Circuit Judges and two (2) Lapeer County District Court Judges (71A District Court), as well as the Lapeer County Prosecuting Attorney and Lapeer County Court Administrator all attest to long relationships with Respondent during which the Courts attest to his great moral character, his reputation in the community, his work ethic on behalf of his clients, his assistance to indigents and his involvement in the community. He is said to have represented his clients with experience, compassion, and a well-developed understanding of the law. He is also referred to as a fierce advocate for his clients and his knowledge of the law surpasses many. He is referred to as a strident and passionate advocate on behalf of his clients and has demonstrated due respect and proper decorum to the Court. [Hearing Panel Report, April 3, 2007, pp 4-5.]

Earlier in that portion of its report, the panel noted other factors warranting consideration, including the aggravating factor of respondent's prior discipline and the mitigating factors of the passage of time since respondent's criminal conviction in the early 1970's and his reprimands in 1991 and 1998; and its conclusion that respondent's misrepresentations to the Court of Appeals could "technically" be considered misrepresentations but were not material or relevant to the issues in the matter before that Court.

Nowhere in its report did the hearing panel purport to weigh or "value" aggravating and mitigating factors.

We are not persuaded that a general rule prohibiting any consideration of character reference letters, unless agreed to by the opposing party, is necessary in discipline proceedings. We note, for example, that such letters are routinely submitted in reinstatement proceedings conducted under MCR 9.124, and such letters are routinely included in the written report prepared by the Grievance

Administrator and delivered to a hearing panel prior to a reinstatement proceeding under MCR 9.124(C).

MCR 9.102(A) directs that the procedural rules in discipline cases found in subchapter 9.100 are to be liberally construed for the protection of the public, the courts and the legal profession. We are able to envision situations in which a panel's liberal construction of the rules will allow the admission of a reference letter under circumstances in which demanding the writer's live testimony at a sanctions hearing, after misconduct has been established, would cause needless expense or delay for all parties involved in the proceeding.

The Grievance Administrator has properly cited the Supreme Court's observation in reference to character evidence:

> "[N]either [a respondent's] legal background nor his community accomplishments obliterate our responsibility to impose the discipline his violations warrant." *Grievance Administrator v Rostash*, 457 Mich 289 (1998), citing *In Re Grimes*, 414 Mich 483, 497 (1982). [Petitioner's Brief in Support, pp 21-22.]

At the same time, character or reputation is recognized in ABA Standard 9.32(g) as a factor which may be considered in mitigation when determining an appropriate sanction under the instructions to utilize the Standards handed down by the Supreme Court in *Grievance Administrator v Lopatin*, 462 Mich 235, 612 NW2d 120 (2000). The hearing panel's consideration of respondent's character and reputation was clearly in accord with Standard 9.32(g) of the ABA Standards. No support has been offered for the claim that the hearing panel "over-valued" that factor.

2. The Aggravating Effect of Respondent's Prior Misconduct

The Grievance Administrator argues that respondent's history of misconduct - a five year suspension, two reprimands, and eight admonishments - was not given sufficient consideration by the panel as an aggravating factor under ABA Standard 9.22(a). At the hearing on discipline, the Administrator offered evidence of the following record of misconduct:

AGC File	Discipline	Effective Date
0684/90	Admonished	04/11/91
2561/91	Admonished	08/20/92
1714/91	Admonished	09/21/92
3114/95	Admonished	07/29/96
0116/96	Admonished	08/25/97

AGC File	Discipline	Effective Date (cont.)
1724/97	Admonished	03/02/98
3203/00	Admonished	06/05/03
0360/05	Admonished	10/04/05

ADB Case No.	Discipline	Effective Date
31215-A	5 Year Suspension	06/18/74
143/84	Reprimand (By Consent)	12/01/86
98-130-GA	Reprimand (By Consent)	11/05/98

It has been noted in prior opinions that the ABA Standards simply list aggravating and mitigating factors which "may" be considered in assessing discipline but they are not weighted relative to each other. *Grievance Administrator v Che Karega*, ADB Case No. 00-192-GA (2004). Furthermore, the Board has held, the weight given to a particular factor may vary, depending upon the nature of the misconduct. *Karega, supra.* There is no one size fits all rule when it comes to how much weight should be given to any aggravating factor - including a lawyer's history of prior discipline.

Respondent's history of misconduct, extensive by any measure, provides examples of the difficulties in attempting to find a formulaic method for applying aggravating and mitigating factors. As just one example, ABA Standard 9.22(a) identifies prior disciplinary offenses as a factor which may be considered in aggravation while Standard 9.32(m) lists "remoteness of prior offenses" as a factor which may be considered in mitigation. We note in this case that respondent's five year suspension in 1974 followed his conviction for bribing a witness in a federal marijuana smuggling case. While the seriousness of that misconduct cannot be overstated, the ABA Standards suggest in Standard 9.32(m) that some consideration may be given to the fact that respondent's suspension was imposed 33 years ago (approximately 25 years before the earliest misconduct in this case). Similarly, although respondent has been reprimanded twice, one reprimand was twenty years ago and the other was eight years ago. Moreover, both reprimands were the result of stipulations for consent orders of discipline agreed to by the then Grievance Administrator and approved by the Attorney Grievance Commission under MCR 9.115(F)(5). The argument in this case that

respondent's prior record of discipline, in and of itself, should be considered as a substantial factor weighing in favor of respondent's disbarment, is not entirely consistent with the position taken by the Attorney Grievance Commission in 1998 when it approved a stipulation with respondent for a reprimand by consent. When the stipulation for a reprimand was considered and approved by the Grievance Commission in that case, respondent's history of prior misconduct was substantially similar from the record considered by the panel in this case. Then, the Commission and the panel approved a reprimand after considering respondent's record consisting of a five year suspension entered 24 years earlier, a consent reprimand entered 12 years earlier and six prior admonishments between seven years and six months old.

By comparison, when the panel considered respondent's record in this case, respondent's five year suspension was almost 33 years old, respondent had an additional consent reprimand and he had received two additional admonishments from the Attorney Grievance Commission, including one issued while this case was pending. In short, it is not clear that a disciplinary record that was not deemed by the Grievance Commission and a hearing panel in 1998 to have sufficient weight as an aggravating factor to warrant even a minimum 30 day suspension must now result in respondent's disbarment because there are now two additional confidential admonishments and a consent reprimand.

We must emphasize that we are not suggesting that respondent's prior history of misconduct should not be given serious consideration. Notwithstanding the passage of time, respondent's felony conviction and five year suspension in 1974 constituted grave misconduct. And, although respondent's 10 subsequent contacts with the Attorney Grievance Commission, when considered individually, were not deemed worthy of formal proceedings in eight instances and not worthy of suspension in the other two cases, there must come a time when the sheer number of prior instances of misconduct must be recognized as calling that individual's fitness as a lawyer into question. Respondent's accumulated record of misconduct is a factor in our decision to increase discipline.

3. Other Aggravating Factors

The Grievance Administrator also argues that the panel never mentioned the following factors described in ABA Standard 9.22 as factors "which may be considered in aggravation:"

A dishonest or selfish motive [Standard 9.22(b)]; a pattern of misconduct [Standard 9.22(c)]; multiple offenses [Standard 9.22(d)]; deceptive practices during the disciplinary process [Standard 9.22(f)]; refusal to acknowledge the wrongful nature of his misconduct [Standard 9.22(g)]; vulnerability of the victim(s) [Standard 9.22(h)]; and substantial experience in the practice of law [Standard 9.22(i)].

As this Board has previously written, if we are to accept the language in Standard 9.22 at face value, that Standard lists factors which "may" be considered in aggravation, "not factors which must be considered in every case." *Grievance Administrator v Che Karega*, ADB Case No. 00-192-GA (2004). It has not been established in this case that the hearing panel was not cognizant of the aggravating and mitigating factors which could have been gleaned from the lengthy record or that the panel willfully overlooked factors critical to the panel's eventual decision.

III. Conclusion

In the final analysis it is the nature of respondent's misconduct in this case, together with his disciplinary history, which prompts our decision to increase discipline to a suspension of one year. More specifically, the finding of the Special Master - which was adopted by the hearing panel and which is not challenged by respondent on review - that respondent made knowing and intentional misrepresentations in an answer to a request for investigation and made a false statement of material fact to a tribunal calls into question respondent's ability to carry out the most fundamental obligations of a lawyer, the duty to tell the truth.

For the reasons discussed, we conclude that this case is not comparable to cases involving a lawyer's deliberate preparation of forged documents, as found in *Grievance Administrator v Mary Gerisch*, *supra*, and *Grievance Administrator v Scott Stermer*, *supra*, but is closer to the misrepresentation to a tribunal found in *Grievance Administrator v Leonard Eston*, *supra*. We therefore order an increase of discipline in this case to a suspension of respondent's license to practice law in Michigan for a period of one year and until he has established his fitness as a lawyer by clear and convincing evidence under MCR 9.123(B) and MCR 9.124. The conditions ordered by the panel regarding malpractice insurance, a course in law office management and engagement of a practice monitor are affirmed.

Board members William P. Hampton, Lori A. McAllister, George H. Lennon, Billy Ben Baumann, M.D., William J. Danhof, and William L. Matthews, C.P.A., concur in this decision.

Board members Rev. Ira Combs, Jr. and Hon. Richard F. Suhrheinrich, did not participate.

Board member Andrea L. Solak was voluntarily recused from participation in this case.

APPENDIX A - MASTER'S REPORT

APPENDIX B - SANCTIONS REPORT