STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellant,

v

Albert J. Dib, P 32497,

Respondent/Appellee,

Case No. 02-78-GA

Decided: May 22, 2007

Appearances:

Patrick K. McGlinn, for Grievance Administrator, Petitioner/Appellant
Michael A. Schwartz, for the Respondent/Appellee

BOARD OPINION

In this case, the Grievance Administrator has petitioned for review of a hearing panel's order of reprimand following its acceptance of a report from a special master finding that respondent deliberately embarrassed and belittled opposing counsel during 14 depositions and in a filed pleading. The Attorney Discipline Board has conducted review proceedings under MCR 9.118 and has reviewed the voluminous record and the well reasoned reports of the Master and the three member hearing panel. Upon consideration of this record, together with the briefs and oral arguments presented by the parties, we conclude that a reprimand, under the circumstances presented in this case, is within the analytical framework of the American Bar Associations Standards for Imposing Lawyer Sanctions and that a reprimand is not inharmonious with disciplinary case law in Michigan. However, while we decline to increase discipline in this case to a suspension of respondent's license to practice law, we have also concluded that protection of the public, the courts and the legal profession will be enhanced by a modification to the panel's order in the form of a two-year probationary period placing respondent and his peers on notice that future adjudications that respondent has engaged in this type of misbehavior will, presumptively, require a period of suspension.

I. Procedural History

On October 2, 2003, the Attorney Discipline Board appointed former Board Chairperson Elaine Fieldman as a Master to hold public hearings on the complaint, to receive evidence and to file a report with the hearing panel under the procedure described in MCR 9.117. The Master conducted public hearings on 11 dates between February 23 and October 18, 2004. The Master's report was filed July 14, 2005. The hearing panel then conducted further proceedings, including additional hearings in October 2005 and September 2006, to consider objections to the Master's Report filed by the respective parties and, following the issuance of its report on misconduct, to determine the appropriate discipline.

Because respondent's conduct is described and discussed in some detail in the reports filed by the Master and the panel, we will not summarize those findings here but have instead attached the reports of the Master and the panel to this opinion as appendices.[1]

The hearing panel's report on discipline and its order of reprimand were issued November 22, 2006. The order of reprimand contained an assessment of costs of $8,689.73, which amount included the administrative cost of $1,500 required under MCR 9.128(B)(1)(b). The respondent did not seek review of either the findings of misconduct or the imposition of discipline. The Grievance Administrator petitioned for review, however, on the grounds that while the panel appropriately utilized the ABA Standards in determining that suspension is the appropriate baseline sanction, the panel gave undue consideration to certain mitigating factors in determining that a reprimand was appropriate in this case. The Grievance Administrator requested that the Board increase discipline to a suspension.[2]

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[1] The Report of Master Elaine Fieldman, filed July 14, 2005 is attached as Appendix 1. The Hearing Panel Opinion and Order Adopting, In Part, the Report of the Special Master, filed July 3, 2006, is attached as Appendix 2. The Hearing Panel Report on Discipline, filed November 22, 2006 is attached as Appendix 3.

[2] The Grievance Administrator did not suggest, either in his petition for review or in his argument to the Board, what the length of such a suspension should be; only that respondent should be "suspended for a period of time to be determined by the Board." (Grievance Administrator's Brief in Support of Petition for Review, p 12.)

II. Discussion

The hearing panel below affirmed the Master's findings that respondent deliberately engaged in a pattern of obstructing depositions by using insulting and demeaning language directed at opposing counsel, generally in the presence of others (including parties, witnesses and court reporters), for the purpose of gaining a tactical advantage or simply to embarrass his opponents. The panel also accepted the Master's findings that respondent filed a pleading, for the purpose of intimidating and harassing an opposing counsel, which falsely alleged that opposing counsel was mentally disturbed and posed a present danger to respondent. Neither party has challenged the panel's conclusions that respondent's conduct was prejudicial to the administration of justice, in violation of MRPC 8.4(a) and (c) and MCR 9.104(A)(4); that respondent's filing of the false pleading violated MRPC 4.4 and MCR 9.104(A)(4); and that respondent's conduct violated MRPC 6.5(a) which prohibits a lawyer from treating persons involved in the legal process with discourtesy and disrespect. As set forth in the attached reports, respondent's conduct occurred at 14 depositions between 1994 and 2002, 11 of which took place in just over two years from late 1999 to early 2002. The full flavor of respondent's demeaning and insulting communications with opposing counsel and his false representation to a tribunal is imparted in the attached appendices.

Nor do the parties disagree that the panel followed *Grievance Administrator v Lopatin*, 462 Mich 235 (2000), in finding that suspension is "generally" the appropriate remedy for respondent's misconduct under Standards 6.22 and 7.2 of the ABA's Standards for Imposing Lawyer Sanctions (1992). Essentially, the Administrator argues that mitigating factors in this case were either counter-balanced by aggravating factors or were not sufficiently compelling to justify the panel's downward departure from the generally appropriate sanction of suspension suggested under those Standards.

Questions of fact are reviewed by the Board under a standard of review akin to the clearly erroneous standard.[3] Questions of law are reviewed de novo.[4] Board review of panel decisions on the level of discipline falls under a standard of review the Board "a relatively high measure of discretion." As the Board stated in *Grievance Administrator v David A. Woelkers*, ADB Case No. 97-214-GA (1998), pp 6-7, lv den 602 NW2d 579 (1999):

> While the Board affords a certain level of deference to a hearing panel's subjective judgment on the level of discipline, the Board possesses, of necessity, a relatively high measure of discretion with regard to the appropriate level of discipline. *Grievance Administrator v James H. Ebel*, 94-5-GA (ADB 1995), citing *Grievance Administrator v August*, 438 Mich 296, 304 (1991); *Matter of Daggs*, 411 Mich 304, 381-319 (1981). Such discretion allows the Board to carry out what the court has described as the Board's "overview function of continuity and consistency in discipline imposed." [*Matter of Daggs*, *supra*, p 320.] "Hearing panels meet infrequently and are exposed to a relatively small number of discipline situations. The Board suffers from no such disadvantage." *Matter of Daggs*, *supra*, pp319-320.

As the Board stated in *GA v Saunders V. Dorsey*, 02-118-AI (ADB 2005),

> It could be argued that since the issuance of a decision in *Grievance Administrator v Lopatin*, 462 Mich 235; 612 NW2d 120 (2000), the Board's scrutiny on review of sanctions determination is somewhat more robust in light of the Board's own duty under *Lopatin* to use the American Bar Association's Standards for Imposing Lawyer Sanctions.

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[3] The Board reviews a hearing panel's factual findings for "proper evidentiary support on the whole record." See, e.g., *Grievance Administrator v T. Patrick Freydl*, 96-193-GA (ADB 1998). This standard is akin to the clearly erroneous standard . . . use[d] in reviewing a trial court's findings of fact in civil proceedings. See MCR 2.613(C)." *Grievance Administrator v Lopatin*, 462 Mich 235, 247-248 n 12; 612 NW2d 120 (2000).

[4] See *Grievance Administrator v Jay A. Bielfield*, 87-88-GA (ADB 1996); *Grievance Administrator v Geoffrey N. Fieger*, Case No. 94-186-GA (ADB 2002).

However, the Board has also observed:

> When it adopted the Standards on an interim basis, our Court explained: "The ABA standards will guide hearing panels and the ADB in imposing a level of discipline that takes into account the unique circumstances of the individual case, but still falls within broad constraints designed to ensure consistency." *Grievance Administrator v Lopatin*, 462 Mich 235, 246; 612 NW2d 120 (2000). The Standards themselves recognize that myriad factual scenarios will present themselves to discipline adjudicators, and that is why every standard is prefaced by the phrase "the following sanctions are generally appropriate." See Standard 5.1. See also *Statewide Grievance Committee v Alan Spirer*, 247 Conn 762, 787; 725 A2d 948 (1999) ("[N]othing in the . . . Standards . . . provides that disbarment or suspension is mandatory in the circumstances articulated therein. Rather, these standards provide that disbarment or suspension 'is generally appropriate' if an attorney is guilty of the misconduct described in them."). [*Grievance Administrator v Travis W. Ballard*, 02-25-JC (ADB 2003).]

In applying the ABA Standards, panels and the Board consider the factors in Standard 3.0 (duty violated, mental state, and injury or potential injury involved) and thus select an applicable standard to recommend a starting point. The next step is the consideration of aggravating and mitigating factors. As to these, the Board has said, in *Grievance Administrator v Arnold M. Fink*, 96-181-JC (ADB 2001) (After Remand):

> The Standards do not dictate precisely what weight should be given to aggravating or mitigating factors. Rather, consistent with their intent to permit "creativity and flexibility in assigning sanctions in particular cases," they call for "consideration of the appropriate weight of [all relevant] factors in light of the stated goals of lawyer discipline." Standard 1.3 The purpose of lawyer discipline proceedings is enunciated in Standard 1.1:
>
> > The purpose of lawyer discipline proceedings is to protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely to properly discharge their professional duties to clients, the public, the legal system, and the legal profession.

Finally, in the final step of the process in Michigan:

> "panels and the Board must consider whether the ABA Standards have, in their judgment, led to an appropriate recommended level of discipline in light of factors such as Michigan precedent, and whether the Standards adequately address the effects of the misconduct or the aggravating and/or mitigating circumstances." *Musilli*, *supra*, p 5, citing *Lopatin*, 462 Mich at 248 n 13. [*Fink*, *supra*.]

Turning to the arguments advanced by the Administrator, we are not persuaded that hearing panels or the Board are so tightly bound by a recommendation in the Standards that a certain level of discipline is "generally" appropriate that higher or lower discipline may be imposed only in the presence of "compelling" mitigation or aggravation. While consideration of aggravating and mitigating factors is an integral part of the process to determining discipline under the ABA Standards, the Standards themselves do not weigh those factors nor do they differentiate between factors which may be "considered" and those deemed to be "compelling."

Certainly, the Board has invoked the phrase "compelling factors" in prior opinions. For example, in *Grievance Administrator v Robert G. Vaughn*, ADB Case No. 00-125-GA (2002), the Board considered a panel decision to impose a suspension of 30 months for a respondent's admitted intentional misappropriation of funds aggravated by five prior admonitions and a 119 day suspension. Citing *Grievance Administrator v Petz*, ADB Case No. 99-102-GA (2001), the Board increased discipline in *Vaughn* to revocation stating: "We are unable to identify compelling mitigating factors in the record which would warrant a departure from the presumptive level of discipline which is called for in this case." Nevertheless, even though the Board may exercise its own discretion as to the weight to be given to aggravating and mitigating factors as part of its duty to provide consistency and continuity in sanctions, neither the Board nor the Court have imposed rigid guidelines for the application of these factors or for the Standards or sanctions generally. As respondent points out, quoting *Lopatin*, *supra*, the Standards "are not analogous to criminal determinate sentences." (462 Mich at 239.)

The panel and the Master cited cases involving deposition misbehavior in Michigan and elsewhere, but, as the panel and Master recognized, this case is somewhat different. Michigan cases

include isolated incidents of disrupting a deposition through a tantrum[5] or a physical altercation.[6] These cases, while not directly on point, provide a guide as to proportionality.

Perhaps of greater relevance is the analysis in *Grievance Administrator v McKeen*, No. 00-61-GA (ADB 2003). In that case, the lawyers sparred verbally, calling each other "weasel" and other things, and then the respondent touched (or grasped) complainant's tie. The Board affirmed a reprimand (though Members Hampton and Suhrheinrich would have imposed "no discipline"). Discussing Standard 6.22 (one of the Standards relied upon in this case), the Board said:

> As for the appropriate level of discipline, no participant in these proceedings can envision that the misconduct established should lead to more than a reprimand. The panel considered the ABA Standards for Imposing Lawyer Sanctions, and concluded, for different reasons, that Standard 6.2 was not dispositive or particularly helpful.[1] The Administrator argued that Standard 6.22 (recommending suspension) was squarely applicable, based in part on the majority's finding that respondent acted "knowingly" as that term is used in the Standards. Notwithstanding these factors, and the virtual absence of mitigating factors recognized in the Standards, both the Administrator and the panel concluded that reprimand is the appropriate discipline in this case. We agree that a suspension is plainly excessive and unwarranted given the nature and circumstances of the misconduct in this particular case.

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[1] ABA Standard 6.2 provides, in part:

6.2 Abuse of the Legal Process

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[5] See *GA v Leonard B. Segel*, No 95-210-GA (ADB 1998).

[6] See *GA v Robert H. Golden*, No 96-269-GA (ADB 2002) (After Remand), announcing suspension the presumptive sanction both pre and post-Lopatin:

> lawyers can expect that conduct rising to the level of a physical assault while performing their legal duties will generally result in a suspension. This does not mean that a suspension may never be imposed for abusive or inappropriate conduct not involving physical contact. Nor does it mean that a suspension will be warranted whenever an attorney touches another person involved in the legal process.

But see also, *GA v Fink*, *supra*, and cases therein for an exception to the suspension-for-shoving rule.

> Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving failure to expedite litigation or bring a meritorious claim, or failure to obey any obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists:
>
> 6.22 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.
>
> 6.23 Reprimand is generally appropriate when a lawyer negligently falls to comply with a court order or rule, and causes injury or potential injury to a client or other party, or causes interference or potential interference with a legal proceeding.

[*McKeen, supra.*]

On the question of when a panel or the Board may depart from a sanction which is "generally" appropriate under the Standards, , this case is, in many respects, more like *McKeen* than like the cases cited by the Administrator involving intentional conversion of client funds or the commission of serious crimes in which the Board has announced its intention to adhere to the highest level of discipline absent unusual circumstances or "compelling" mitigation.

In finding that ABA Standard 6.22 and 7.2 applied, the panel below found that the misconduct "cause[d] injury or potential injury to a client or a party, or caused interference or potential interference with a legal proceeding." We are not persuaded that the panel was then prohibited from further taking into account the degree of the harm in fashioning the ultimate disposition or discipline. Indeed, "injury" or "potential injury" are broad categories. We do not believe that an adjudicator attempting to utilize the Standards should be prevented from further describing the degree of harm so as to place a particular case in context vis-a-vis other cases which involving greater or lessor degrees of harm or injury. The Board and panels have traditionally compared cases based on a variety of factors in order to achieve the consistency and continuity identified by the Supreme Court as a worthy goal. These factors can, and often should, include the extent of harm caused by a respondent's actions.

Nor are we persuaded that the panel erred in its reliance on respondent's characterization of his actions as zealous advocacy or the panel's conclusion that respondent lacked a selfish or dishonest motive. The ABA Standards adopted by the Court in *Lopatin* include "absence of a

dishonest or selfish motive" as a factor in mitigation." Standard 9.32(b). Moreover, Standard 9.32 places no limitation on the factors which may be considered; it provides that, "Mitigating factors *include* . . . (emphasis added)." And the Court in *Lopatin* encouraged explanation and articulation of factors by panels:

> We caution the ADB and hearing panels that our directive to follow the ABA standards is not an instruction to abdicate their responsibility to exercise independent judgment. Where, for articulated reasons, the ADB or a hearing panel determines that the ABA standards do not adequately consider the effects of certain misconduct, do not accurately address the aggravating or mitigating circumstances of a particular case, or do not comport with the precedent of this Court or the ADB, it is incumbent on the ADB or the hearing panel to arrive at, and explain the basis for, a sanction or result that reflects this conclusion. [*Lopatin*, 462 Mich at 248 n 13.]

Use of the ABA Standards under the procedure described in *Lopatin* calls for consideration of the respondent's state of mind to identify a particular Standard before aggravating and mitigating factors are brought to the equation. It does not follow, however, that no further distinctions may be drawn as to state of mind, especially with regard to the lack of a selfish motive which, as noted before, is explicitly recognized as a mitigating factor in ABA Standard 9.32(b).

In short, while respondent's conduct as described in the complaint and found by the Master and the panel is to be condemned and must result in a professional sanction, it has not been demonstrated here that a suspension of respondent's license to practice law is so clearly required under the ABA Standards or prior case law that the reprimand imposed by the panel is plainly incompatible with the goals of these proceedings.

In its report, the panel observed:

> As to respondent's unwillingness to acknowledge that he acted unprofessionally, it appears to us as though respondent may simply be incapable of acknowledging personal wrongdoing. Were we to conclude, from that, that respondent is likely to be a repeat offender, we would consider this inability to be a serious aggravating factor. However, our perception is that no matter the extent to which respondent may engage in word games with the panel, or the grievance administrator, or the Master, in lieu of addressing the

> propriety of his actions, in reality he is not likely to be a repeat offender. If we are wrong in that regard, his future misconduct can appropriately be dealt with in a future proceeding. [Report on Discipline, p 4.]

A similar question was posed by a member of the Board at the review hearing conducted on April 12, 2007:

Board Member Lennon:	Counsel, is it admitted to be inappropriate? One of the problems with this situation is he has never rally forthrightly said he did wrong things.
Mr. Schwartz:	I understand that.
Board Member Lennon:	Are we admitting it now?
Mr. Schwartz:	What he is saying now is yes, now having looked at this and having reflected on this he now acknowledges that he has done things that were inappropriate that he should not have done, otherwise he would have filed an appeal from that because we certainly had the opportunity to do that. [Review hearing transcript, p14.]

III. Conclusion

Based upon our review of the record we are inclined to agree with the panel's assessment of the unlikelihood of future misconduct of this type by this respondent. Mindful of the overriding principle articulated in MCR 9.105 that discipline for misconduct is not intended as punishment for wrongdoing, but for the protection of the public, the courts and the legal profession, we see no need for further measures which could be viewed as primarily punitive. We do, however, believe that appending a two year probationary period to the reprimand ordered by the panel is entirely consistent with the goal of ensuring protection of the courts, the legal profession and the public in the future.

We therefore modify the panel's order by directing that respondent shall be subject to a probationary period of two years, commencing the effective date of the order of reprimand. If, during that two year period, respondent engages in abusive, discourteous or unprofessional conduct of the type found in this case, and which results in an adjudication of professional misconduct,

respondent shall be deemed to be in violation of the modified order and respondent shall be subject to a further proceeding before a panel where he shall be required to show cause, if any, why his license to practice law in Michigan should not be suspended.

Board members Lori A. McAllister, Hon. Richard F. Suhrheinrich, William J. Danhof, and William L. Matthews, C.P.A., concur in this decision.

Board member Rev. Ira Combs, Jr., dissenting: Although the hearing panel is to be commended for its diligence and thoughtfulness, I believe that this Board has both the discretion and an obligation to announce certain levels of discipline for certain types of misconduct. In that spirit, I would impose a suspension of thirty days in this case, not to punish this particular respondent, but to send a message of zero tolerance for the type of unprofessional behavior exhibited by Mr. Dib.

Board Member George H. Lennon: I would also increase discipline in this case to a suspension of thirty days, primarily on the basis of the pattern of misconduct involving this type of behavior on at least 14 separate occasions.

Board members William P. Hampton, and Billy Ben Baumann, M.D., were absent and did not participate.

Board member Andrea L. Solak was voluntarily recused and did not participate.

APPENDIX 1

STATE OF MICHIGAN
ATTORNEY DISCIPLINE BOARD

GRIEVANCE ADMINISTRATOR,
Attorney Grievance Commission,
STATE OF MICHIGAN,

Petitioner,

ADB Case No. 02-78-GA

vs.

ALBERT J. DIB P-32497,

Respondent.
_____/

MASTER'S REPORT

SUMMARY OF PROCEEDINGS

This Master was appointed under an Order dated October 2, 2003. A hearing was held at the offices of the Attorney Discipline Board in Detroit, Michigan on February 23 and 24, 2004, April 14 and 15, 2004, May 26, 2004, June 15 and 16, 2004, August 25 and 26, 2004, October 15 & 18, 2004. Petitioner and Respondent each filed proposed findings of fact and conclusions of law. This Master has considered the testimonial and documentary evidence and the proposed findings and conclusions.

LIST OF EXHIBITS

The following exhibits were introduced at the hearing without objection:

Petitioner's Stipulated Exhibits

A. Deposition of G. Douglas Moir, M.D., November 18, 1994 (Oakland Circuit Court Case No. 93 457167 NH)

B. Deposition of Amy Green, Friday November 15, 1996 (Wayne County Circuit Court Case No. 96-608039-NH)

C. Deposition of Dr. Barry Meyer, December 30, 1997 (Wayne County Circuit Court Case No. 97-707160-NH)

D. Continued deposition of Barry S. Meyer, D.O., February 17, 1998 (Wayne County Circuit Court Case No. 97-707160-NH)

E. Partial deposition of Frank Lanzilote, D.O., February 28, 1998 (Wayne County Circuit Court Case No. 97-725045-NH)

F. Deposition of Sanganur Z. Mahadevan, M.D. April 30, 1998 (Wayne County Circuit Court Case No. 97-736272-NH)

G. Deposition of Dr. Barry Meyer, November 23, 1999 (Wayne County Circuit Court Case No. 98-833653-NH)

H. Deposition of Joseph Randolph, April 6, 2000 (Wayne County Circuit Court Case No. 99-935563-NH)

I. Deposition of Jennifer Hesson, November 16, 2000 (Wayne County Circuit Court Case No. 00-019562-NM)

J. Deposition of Bill Johnson, November 30, 2000 (Wayne County Circuit Court Case No. 99-935563-NH)

K. Deposition of Phillip Robinson, M.D., December 18, 2000 (Wayne County Circuit Court Case No. 00-019562-NM)

L. Deposition of Marilyn T. Pierce, April 18, 2001 (Wayne County Circuit Court Case No. 00-023045-NO)

M. Deposition of Christine Wiseman, R.N., June 5, 2001 (Wayne County Circuit Court Case No. 00-38702-NH)

O. Deposition of Gabriel Rosanwo, M.D., November 9, 2001 (Wayne County Circuit Court Case No. 01-118683-NO)

P. Deposition of Gladys Martinez, December 7, 2001 (Wayne County Circuit Court Case No. 01-118683-NO)

Q. Deposition of Jeffrey Gelblum, M.D., April 17, 2002 (Macomb Circuit Court Case No. 01-1350-NH)

R-1 Video tape of Deposition from Randolph v Adams, Case # 99-935563 NH, J.R. Ziolkowski, Date: 11/17/00

R-2 Transcript of Exhibit R-1 video tape

S. Audio tape of Deposition of Christine Wiseman, July 5, 2001 (Wayne County Circuit Court Case No. 00-038702-NH)

U. Authentication of Record, April 8, 2004 (Wayne County Circuit Court Case No. 97-707160-NH) and attachments

W. Authentication of Record, June 4, 2001(Wayne County Circuit Court Case No. 00-019562-NM), and attachments

X. Plaintiff's Response to Defendant's Motion to Strike Orders, Affidavit of Service, January 25, 2001, Order Adjourning Dates and Compelling Deposition, Affidavit of Service, January 25, 2001, Order Granting Defendants' Motion for Discovery Only Depositions of Plaintiff's Experts, Affidavit of Service and attached a portion of transcript in a proceeding on January 12, 2001 before Hon. Isidore Torres. (Wayne County Circuit Court Case No. 00-019562-NM)

Y. Docket Sheet (Wayne County Circuit Court Case No. 00-019562-NM)

Z. Curriculum Vitae of Lawrence S. Charfoos, Esq.

Respondent's Stipulated Exhibits

1. Default Form

2. Transcript of Plaintiff's Motion for Entry of Order, November 17, 2001 (Wayne County Circuit Court Case No. 99-935563-NH)[1]

3. Curriculum Vitae of Albert J. Dib, Esq.

4. Order for Continued Deposition of Dr. Robinson, April 3, 2001 (Wayne County Circuit Court Case No. 00-019562-NM)

5. Order Compelling Discovery, April 17, 2001 (Wayne County Circuit Court Case No. 00-038702-NH)

[1] The hearing transcript states at one point that Respondent's Exhibit 2 is the Request for Investigation and cover letter in this matter (2/24/04:92), but the document marked Respondent's Exhibit 2 is what is identified in the list above. See also 8/25/04:115. References to the hearing transcript are (date of hearing: page of transcript).

6. Order for Discovery, July 27, 2001 (Wayne County Circuit Court Case No. 00-038702-NH)

7. Order Regarding Plaintiff's Motion to Compel Continued Deposition, December 7, 2001 (Wayne County Circuit Court Case No. 00-038702-NH)

E-1. The complete deposition of Frank Lanzilote, D.O. February 28, 1998 (Wayne County Circuit Court Case No. 97-725045-NH)

The following exhibit was admitted over objection.

Petitioner's Exhibits

N. Praecipe/Notice of Hearing, Plaintiff's Motion to Strike . . ., to Compel Discovery and for Protective Order, Brief in Support, Affidavit of Service, Evans v St. John Hospital (Wayne County Circuit Court Case No. 00-038702-NH).

LIST OF WITNESSES WHO TESTIFIED AT THE HEARING

For Petitioner

1. Raymond Morganti

2. George Zemnikas

3. Mary Oppenheim

4. Michael Rinkel

5. Wilson Copeland

6. Susan J. Zbikowski

7. Stephanie Griz

For Respondent

1. Sherwin Schreier

2. John M. Toth

3. Barry Meyer, M.D.

4. Honorable Pat Donofrio

5. Stuart Eisenberg

6. Albert J. Dib

7. Kenneth Essad

FINDINGS OF FACT

1. Respondent, Albert J. Dib, was licensed to practice law in Michigan in 1981 (Exhibit 3; Formal Complaint and Answer, Paragraph 1).

2. Exhibits A-M and O-Q contain examples of Respondent's conduct during several depositions. Taken together, these exhibits along with Respondent's testimony and the testimony of other witnesses, convinces me that Respondent tactically engaged in commentary and actions as a means to provoke, intimidate or belittle opposing counsel and/or their clients. Respondent was sarcastic, insulting, condescending, patronizing and rude. These tactics in no way furthered the interests of his clients -- in the cited examples Respondent was not protecting his clients, but rather used these methods as a way to disrupt the proceedings, intimidate opposing counsel or divert opposing counsel from the job at hand.[2]

3. Respondent insulted and belittled opposing counsel in calling him a "nitwit" (Exhibit A: 91); told the client he "should hire another lawyer" (Ex A: 91); told opposing counsel to be quiet and "shut up" (Ex C: 11; Ex U: 73 of attached Ex C); and criticized in a sarcastic and

[2] See for example Ex A: 87, 90, 91, Ex C: 10, 11, 14-24, Ex D: 74, 77, 121, 138; Ex G: 44, 62, 69-70, 92-93, 107-111, Ex H: 27, Ex I: 4, Ex J: 20-22, Ex K: 57, 81, Ex L: 39, 41-43, 63-64, 92, Ex M: 19, Ex O: 88, Ex P: 45, 85, 97, Ex Q: 6-7. References are to (Exhibit Letter: page of transcript within the exhibit).

demeaning way opposing counsel's competence or ability to ask questions (Ex D: 74, 77, 138; Ex G: 44; Ex I: 4; Ex L: 64; Ex P: 85, 97; Ex C to Ex U at 72-73).

4. Respondent engaged in condescending and patronizing conduct by directing counsel to get the answer from her own client, rather than the deponent, Respondent's client (Ex B: 90), and by commenting to opposing counsel:

— "I'm trying to help you out." (Ex B: 87; Ex D: 77; Ex H: 27).

— "I'm prepared to continue this deposition if you can calm down, if you can collect yourself . . . I will give you a glass of water if you are taking medication . . . give you time to take your medication . . . if you want to use the restroom, take a break, get something to eat that's fine." (Ex C: 22).

— ". . . the idea is when you come to these depositions to ask questions that you do not know the answer to." (Ex G: 44).

— "I tried to relax you a little bit . . . I asked you how your 4th of July Holiday was, tried to calm you down . . ." (Ex M: 19).

5. Respondent interrupted opposing counsel, testified during depositions and coached witnesses (Ex A: 91; Ex B: 33-34, 86-87, 90, 96; Ex C: 9-11; Ex D: 71-74, 126, 135, 145-146, 177-178, 193-194; Ex G: 107-109; Ex H: 27).

6. Respondent scolded, lectured and tried to intimidate opposing counsel and witnesses:

— "I'm going to keep you on a tight leash." (Ex C: 22).

— "Your problem is you are defending a client here that lied under oath and you are put in the dubious position of having to defend that liar." (Ex D: 121).

— "The problem is you can't handle the truth." (Ex D: 122).

— "Self-serving on your client's part, that is what it means." (Ex G: 62).

— ". . .you just button it . . . You want to be spanked?" (Ex J: 21- 22)

— "You've been real good sitting there . . . not saying anything and knowing your place in this deposition. So you just sit there and be quiet and enjoy the ride while we're over here talking business." (Ex K: 57).

— "The trouble with you docs is that you don't listen carefully enough; otherwise, you wouldn't get yourselves in this mess." (Ex K: 81).

— "Should I call your boss in here to see if he can straighten you out? . . . I'll give you another chance but you better behave . . . Shameful behavior on your part. Shameful. And this is what your client is paying for. It's pathetic." (Ex L: 41-43)

— "We can get to the truth eventually . . . You can't hide the truth as much as you want to." (Ex L: 63).

— "I know you're very nervous and that your counsel next to you is very nervous in this deposition . . . I know that both of you are sweating under your collars given the testimony here." (Ex L: 92).

— "I think we'll have to circulate this transcript among the [M]TLA members to show a classic example of how a shameful defense lawyer coaches a witness . . . ." (Ex O: 88).

— "You are totally unprepared . . . ." (Ex P: 45).

— "Aren't you embarrassed? That was pathetic." (Ex L: 39). See also Ex C: 14-24; Ex G: 92-93, 110-111; Ex U: 107-108 of attached Ex C.

7. Respondent called opposing counsel names (Ex Q: 6-7).

8. Respondent has a different set of rules for his deposition conduct than his opponents.

According to Respondent, opposing counsel's speaking objections justify Respondent's insulting remarks, but when Respondent makes a speaking objection, anyone can tell that it is really an appropriate lack of foundation objection. See e.g. 4/15/04: 33-36, 52.[3]

Respondent claims he is justified in making ad hominem attacks when, in his opinion, opposing counsel is coaching the witness, but Respondent "explains" that his coaching of witnesses is nothing more than protecting or clearing up the record. Similarly, while opposing counsel must

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[3] References are to date of hearing: page of transcript.

wait to rehabilitate witnesses when it is their turn to ask questions, Respondent is permitted to prevent the "trickery" of opposing counsel by interceding during their questioning. See e.g. 4/14/04: 137; 4/15/04: 33-36; 5/26/04: 10-12, 32-34, 126-127. And when opposing counsel questions a witness whether she is aware she is under oath, Respondent concludes that this question "serves only one purpose, and that is to intentionally attempt to intimidate and harass the deponent" (4/14/04: 118), but when he calls a party a liar, it is appropriate (Ex D: 118-121).

9. The tactical nature of Respondent's conduct is supported by the exhibits themselves, Wilson Copeland's testimony (8/25/04: 80-81), the Honorable Pat Donofrio's testimony (2/24/04: 159, 167) and Respondent's testimony. Judge Donofrio characterized Respondent as "passionate" and "engaged" and "on the switch" (2/24/04: 159). He distinguished Respondent's motion and trial conduct from his deposition conduct (2/24/04: 160). Judge Donofrio suggested that because Respondent did not, in his experience prevent discovery from being completed, his conduct was acceptable, but said "[s]ome depositions have gone easier than others" (2/24/04: 159). Judge Donofrio did not read any of the depositions at issue in this matter (2/24/04: 162). While Judge Donofrio was generally supportive of Respondent, it is clear from his testimony that in his experience Respondent is a different person when a judge is present than during deposition. This testimony supports the finding that Respondent's deposition behavior was tactical. And, while Judge Donofrio may describe Respondent as "passionate" and "engaged", the deposition transcripts (which the witness did not review) show a lawyer who was tactically sarcastic, patronizing, condescending, insulting and intimidating. It appears that Judge Donofrio was attempting to find words to describe Respondent's deposition behavior in what he would characterize as acceptable.

Copeland's testimony, which I find to be very credible, accurately describes the sense of Respondent's deposition strategy versus his motion practice and his "unique" deposition antics (8/25/04: 80-81):

> Motion practice he conducted himself as any lawyer does. He advocates for his client in front of the court in a reasonable fashion. In terms of the pre-trial discovery and I feel compelled to put this on two levels, Mr. Dib is unique in his personality with regards to his degree of being asserbic (phon.) and sometimes insulting and sometimes snide . . . I have come to believe that based on our exchanges when we are not engaged that his asserbic [sic] and pointed comments are tactics that are designed to anger his opposition, throw him off balance. [8/25/04: 80].

10. Respondent's Filing of Exhibit N, Plaintiff's Motion to Strike Defendants' Pleadings, or, in the Alternative, to Compel Discovery and for Protective Order, was motivated to a great extent to intimidate and harass opposing counsel. In the motion, Respondent asserted that opposing counsel "is mentally disturbed and poses a present danger to Plaintiff's counsel and others." Respondent requested that the court remove opposing counsel from the case and compel the continuation of a deposition with an armed guard in the courthouse. Respondent testified that he thought that the motion was necessary because he was fearful and that all of the allegations in the motion were true (6/15/04: 8-9). Yet, he did not proceed with the motion and stipulated with opposing counsel to an order continuing discovery.[4] Respondent's explanation is specious; his conduct shows that he was not interested in having a deposition with an armed guard, but rather to

[4] In his proposed findings, Respondent asserts that he "genuinely believed that Mr. Rinkel, at the time that he filed the motion, was a person who was dangerous." Respondents Findings of Fact and Conclusions of Law, ¶P 4 (at page 26). First, Respondent has offered no explanation as to why that opinion changed. Moreover, at the hearing Respondent testified that his goal in filing the motion was to "finish the deposition" (6/16/04: 14-19). And, he also testified that the allegations were true and he was prepared to argue the motion (6/15/04: 8-9; 6/16/04: 20-21).

harass counsel. If, as Respondent asserted, opposing counsel was mentally disturbed and a present danger, he would have filed a request for investigation as opposing counsel would have been unfit to practice. MRPC 8.3.[5] I find the overwhelming evidence is that this motion was filed merely to harass and intimidate opposing counsel.

CONCLUSIONS

The Grievance Administrator claims that Respondent's conduct violates MCR 9.104(A) and MRPC 1.2(a), 3.4(a), 4.4, 6.5(a) and 8.4 (a) - (c).

In order for litigation to proceed in a manner that will protect the public and insure the litigants' right to a fair trial, discovery must be conducted in a non-threatening and professional manner. This is especially true in depositions, where there is no judge or officer to umpire the proceedings. Depositions are no place for insulting, patronizing, scolding, and lecturing conduct. See Grievance Administrator v Segel, Case No. 95-210-GA (ADB 1996). Lawyers are not protecting or representing their clients when they engage in insulting gratuitous comments directed at opposing counsel and their clients. Commenting on opposing counsel's ability to formulate questions, insulting the lawyer's professional competence, demeaning opposing counsel by

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[5] Respondent's counsel repeatedly elicited testimony to the effect that opposing counsel did not file requests for investigation with regard to most of Respondent's conduct that is the subject of this case. He argued there is a duty to report all misconduct under MRPC 8.3 and because other lawyers did not file requests for investigations, Respondent did not commit misconduct. First, even if opposing counsel had violated the rules by not reporting misconduct, that does not mean that Respondent did not commit misconduct. Moreover, MRPC 8.3 applies only where there is a "substantial question" as to the lawyers "honesty, trustworthiness or fitness as a lawyer." Respondent's conduct does not meet this standard and thus the lawyers did not have a duty to report under MRPC 8.3. However, if the allegations in Exhibit N were true as Respondent testified, certainly Respondent would have had an obligation to report under MRPC 8.3 as a lawyer described in Exhibit N would not be fit to practice law. Respondent did not report because he knew that opposing counsel was not a danger.

threatening to call in the boss or to get her spanked, making patronizing comments about unsupported medical or mental health conditions and insulting opposing counsel's clients and the substance of their cases are not in the realm of protecting or representing one's own client. I conclude that Respondent's conduct overall and taken as a whole has crossed the line. He engaged in rude, condescending, intimidating, sarcastic, insulting, belittling, patronizing and scolding tactics to interfere with opposing counsel's ability to question witnesses and to intimidate the opposing party.

Conduct such as this, which I have found to be a tactical and planned way of conducting depositions, is prejudicial to the administration of justice. "In short, we can envision no case in which it would be proper to insult, belittle, or demean any person or legal defense or to engage in disrespectful levity." Weiand v Florida, 701 So2d 562, 565 (Florida Ct. App. 1997), rev'd on other grounds 732 So2d 1044 (Florida Sup. Ct. 1999).

This is not a case of the discipline board becoming the "language police." Insults during private meetings or on the telephone may be offensive, but are far different from those made in a proceeding under the court rules. Respondent's cited cases are not on point. Grievance Administrator v Szabo, Case No. 96-228-GA (ADB 1998) involved a private exchange and the respondent walked away after making an isolated inappropriate comment. In Grievance Administrator v MacDonald, Case No. 00-4-GA (ADB 2001), the respondent called opposing counsel names during a private telephone conversation. Telephone conversations and settlement meetings are not proceedings. Depositions require an orderly question and answer format. Our civil litigation system depends on courtroom decorum in these non-supervised deposition settings. If depositions become stages for lawyers to exhibit skills at being sarcastic, patronizing and insulting,

the system will break down. Florida Bar v Martocci, 791 So2d 1074 (Fla 2001); In the matter of Vincenti, 458 A2d 1268 (NJ 1983); Matter of Crumpacker, 383 NE2d 36 (Ind 1978), cert den 444 US 979 (1979). "Attorneys are not prohibited from using profane and vulgar language at all times and under all circumstances. Rather, they are prohibited from using such language when to do so would be prejudicial to the administration of justice." Attorney Grievance Comm'n v Alison, 317 Md 523, 538; 565 A2d 660 (1989).

This is not a case of a lawyer having a bad day. The witnesses (including the Respondent himself) and the transcripts show a pattern and a calculated method of being insulting and condescending as a vehicle to intimidate opposing counsel and their clients. Cases in Michigan and other jurisdictions support the view that this kind of behavior is misconduct. *See* Grievance Administration v Fink, Case No. 96-181-JC (ADB 1998).

This is not a case of first amendment rights or free speech. By taking the oath, Respondent has agreed to abide by the Rules of Professional Conduct. The Rules prohibit this type of intimidating and harassing conduct. This is not an infringement on speech – there is no right to insult or demean a witness or opposing counsel.

Respondent's lengthy and at times tiresome justifications for his conduct are no defense. The instances are too many and provocation is no defense to belittling, patronizing, and insulting others in the judicial process. Grievance Administration v Segal, supra.[6]

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[6] For example, Respondent's attempted justification for berating Ms. Zbikowski – that her client had been defaulted and she had no right to participate in the deposition is specious. Zbikowski had participated in other depositions without incident. Respondent asserted without any support that Zbikowski had been sent to harass Respondent. Zbikowski's comments were innocuous – she did not harass Respondent. Respondent just wanted an excuse to jump. (Ex J: 20-22; 10/18/04: 9).

I want to stress that this is the case of a lawyer engaging in a pattern of calculated unprofessional conduct. This recommendation should not be read as a vehicle for the Attorney-Discipline Board to review every deposition and decide whether a lawyer is conducting himself within the Michigan Court Rules pertaining to discovery. Regardless of the opposing counsel's improper questioning, in the depositions presented here, Respondent was not justified in being abusive to opposing counsel, litigants and witnesses.

Respondent's claim that because the depositions were concluded, there can be no finding of prejudice to the administration of justice misses the mark. We have no way of measuring the impact on the witness and the process. There may be many reasons why most of these depositions continued in the face of Respondent's conduct, not the least of which are time, money, and the court's reluctance to review deposition behavior.[7] Significant disruption of proceedings is not required to support a finding of misconduct under MRPC 8.4(c). See Grievance Administration v Brian McKeen, Case No. 00-61-GA (ADB 2003). Because delay does not immediately occur, that does not mean the conduct does not interfere in the administration of justice. "Conduct of this type breeds disrespect in the courts and the legal profession. Dignity, decorum, and respect are essential ingredients in the proper conduct of a courtroom, and therefore in the proper administration of justice." Attorney Grievance Commission v Alison, 317 Md 523, 536; 565 A2d 660 (1989). A deposition commands the same requirement of dignity, decorum and respect.

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[7] Judges are often reluctant to get involved in discovery disputes. Typically they are not aware of patterns as they only see discovery in a single case. Regardless, the fact that a judge has not sanctioned Respondent is not determinative. The discipline system has an independent obligation to protect the public from conduct prejudicial to the administration of justice.

The testimony is unrebutted that Respondent does an excellent job in court representing his clients. I have no reason to conclude otherwise. He is competent and knowledgeable. While the Master is not authorized to impose or recommend sanctions, having extensively reviewed all of the evidence and hearing the witnesses, to me this type of behavior, without more (e.g. other discipline), does not warrant suspension.

With respect to the Grievance Administrator's allegations of violations of specific rules, I recommend the following conclusions:

1) Respondent violated MCR 9.104(A)(1) to the extent it is synonymous with MRPC 8.4(c), but not as a separate basis for discipline.

2) Respondent violated MCR 9.104(A)(4) because I recommend a finding of a violation of MRPC 8.4(c) and 4.4, but not as a separate basis for discipline.

3) Respondent did not violate MCR 9.104(A)(2) or (3). These rules do not seem to apply to this type of misconduct and the Grievance Administrator has not sufficiently explained why they should.

4) Respondent did not violate MRPC 1.2(a). MRPC 1.2(a) does not apply here. This rule applies primarily to the lawyer/client relationship.

5) Respondent did not violate MRPC 3.4(a). There is no evidence that Respondent obstructed access to evidence.

6) Respondent violated MRPC 4.4 in filing Exhibit N for the reasons stated in this opinion.

7) While MRPC 6.5(A) arguably applies here, I have difficulty in applying this rule in such a broad way and thus recommend a finding of no violation of this rule.

8) Respondent violated MRPC 8.4(a) for the same reasons as set forth in Paragraph 2 above.

9) Respondent did not violate MRPC 8.4(b).

10) Respondent violated MRPC 8.4(c)for the reasons stated in this opinion.[8]

I find it unnecessary to make a separate finding as to each deposition example that the Grievance Administrator referenced. Taken as a whole and listening to the Respondent's testimony and reviewing the examples in the deposition transcripts establishes that Respondent engaged in conduct that was abusive and insulting to others and prejudicial to the administration of justice. He also engaged in conduct to harass and embarrass opposing counsel. See Grievance Administrator v MacDonald, supra at p. 2-3, n2

JUL 14 2009
Date

Elaine Fieldman, Master
(w/permission)

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[8] Respondent's Motion for Involuntary Dismissal and Motion to Preclude Rebuttal Testimony should be decided by the Hearing Panel. I recommend that they be denied. Having recommended a finding of misconduct means that the Grievance Administrator proved its case and thus the motion for dismissal should be denied. The rebuttal testimony was proper and Respondent was not prejudiced.

APPENDIX 2

STATE OF MICHIGAN

Attorney Discipline Board

GRIEVANCE ADMINISTRATOR,
Attorney Grievance Commission,

Petitioner,

v Case No. 02-78-GA

ALBERT J. DIB, P 32497,

Respondent.
_____/

OPINION AND ORDER ADOPTING
IN PART THE REPORT OF THE SPECIAL MASTER

On August 2, 2002, the Grievance Administrator filed a formal complaint alleging that on 17 occasions between 1994 and 2002 respondent deliberately obstructed the orderly administration of justice through discourteous and disrespectful conduct toward other participants involved in the legal process. The complaint also alleged that on another occasion, respondent filed a motion that contained false statements for the purpose of harassing opposing counsel. The Grievance Administrator alleged that respondent's actions violated MCR 9.104(A) and Michigan Rules of Professional Conduct (MRPC) 1.2(a), 3.4(a), 4.4, 6.5(a) and 8.4 (a)-(c).

On October 2, 2003, a Special Master was appointed to receive evidence and file a report, pursuant to MCR 9.117. The Master took testimony over 11 days in 2004, and filed her report on July 14, 2005. The Master made findings of fact which demonstrated that respondent deliberately engaged in a pattern of obstructing depositions by using insulting and demeaning language directed at opposing counsel, generally in the presence of others (including parties, witnesses and court reporters), for the purpose of gaining a tactical advantage or simply to embarrass his opponents. The Master also found that respondent filed a pleading, for the purpose of intimidating and harassing opposing counsel, which falsely alleged that opposing counsel was mentally disturbed and posed a present danger to respondent.

The Master determined that respondent's conduct at depositions was prejudicial to the administration of justice, in violation of MRPC 8.4(a) and (c) and MCR 9.104(A)(4). She determined that respondent's filing of the false pleading violated MRPC 4.4 and MCR 9.104(A)(4). She determined that respondent did not violate MRPC 1.2(a), 3.4(a) and 8.4(b). Finally, the Master determined that respondent arguably violated MRPC 6.5(a), but recommended against finding a violation of this rule.

For the reasons stated below, we: 1) adopt the Master's report and recommendation that respondent violated MRPC 8.4(a) and (c), and MCR 9.104(A)(1) and (4), through his pattern of conduct at depositions; 2) adopt the Master's report and recommendation that respondent violated MRPC 4.4 and MCR 9.104(A)(4) by filing a pleading which falsely alleged that another attorney was mentally disturbed and posed a physical danger to others; and 3) adopt the Master's report and recommendation that respondent did not violate MRPC 1.2(a), 3.4(a), 8.4(b), and MCR 9.104(A)(2) and (3). In addition, we find that respondent's conduct did violate MRPC 6.5(a).

With respect to all but MRPC 6.5(a), we adopt the Master's careful and thoughtful opinion, adding a few comments of our own.

The Master determined, and we agree, that respondent used a variety of demeaning terms to describe counsel who opposed him in 14 depositions between 1994 and 2002, eleven of which took place in just over two years from late 1999 to early 2002.[1] (Report Findings of Fact 2-7.) The Master determined, and we agree, that respondent did this deliberately and without legitimate tactical purpose, usually for the purpose of embarrassing his opponents.[2]

Respondent has defended against the charge of misconduct by arguing that the Attorney Discipline Board has no business regulating attorney speech. Certainly, we are very wary of any restriction on verbal expression. In light of this legitimate concern, we, like the Master, think it important to emphasize at some length, at the outset of our analysis, what this case is not about.

This case is not about an isolated instance of inappropriate conduct or speech. *Cf. Administrator v. Szabo*, 96-228-GA (under the circumstances of *Szabo* an isolated instance of highly inappropriate speech was not misconduct). Rather, the evidence shows that respondent engaged in an extended pattern of deliberately demeaning, patronizing, insulting and obstructive speech. Indeed, the existence of this pattern is significant to our conclusion that respondent's conduct at depositions violated MRPC 6.5(a), 8.4(c) and 9.104(A)(4).

This case is not about uncontrolled outbursts, e.g., a lawyer who, because he is temporarily unable to contain his passion, uses offensive expletives in his excitement. *Cf. Administrator v. MacDonald*, 00-4-GA (not misconduct when attorney referred to opposing counsel as "lying son of a bitch" and "shyster" in one heated private telephone call). Rather, the evidence shows that respondent *deliberately* demeaned, embarrassed and obstructed his opponents.

This case is not about turning the Grievance Administrator into the "language police," in the sense of ensuring that counsel use only inoffensive words during court-related proceedings. *Cf. id.* at 2 ("This panel will not become language referees"). Indeed, the most inherently offensive words respondent used to characterize his opponents are "asshole" and "nitwit" - in other circumstances, the isolated use of those words, or words far more intrinsically offensive, would not rise to the level of misconduct. As the Master noted,

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1 The Master's report does not explicitly refer to two of the depositions which were the subject of the complaint, Exhibits E and F. We do not find significant misconduct in Exhibit F. However, we find that respondent's actions as recorded in Exhibit E do constitute misconduct, as set forth later in this opinion. The Master's report also does not explicitly refer to respondent's statement at the conclusion of the 9/7/01 deposition which is the subject of paragraph 25(o) of the Formal Complaint. We have included that statement within our discussion of the pattern of respondent's misconduct.

2 Respondent testified before the Master over the course of several days. During his testimony he repeatedly offered justifications for the comments he had made to opposing counsel which gave rise to the complaint. One who reads his testimony comes away with the clear impression that these justifications are, as the Master stated with respect to one, "specious." (Report at Finding of Fact 10.) One further comes away with the impression that during his testimony respondent was nearly as contemptuous of the disciplinary process as he appears to have been of opposing counsel.

> "[a]ttorneys are not prohibited from using profane and vulgar language at all times and under all circumstances. Rather, they are prohibited from using such language when to do so would be prejudicial to the administration of justice." *Attorney Grievance Commission v. Alison*, 317 Md 523, 538 (1989).

The misconduct here does not result from the intrinsic nature of the words respondent used, but rather from his deliberate use of these and otherwise innocuous words for the purpose of belittling and embarrassing other participants in the legal process.

Finally, this case is not about speech protected by the First Amendment. *Cf. In re Chmura*, 461 Mich. 517 (2000) (giving narrow interpretation to rule that forbids false statements by candidates for judiciary, in order to avoid First Amendment concerns). Respondent was not making his comments in the course of any political campaign, or for the purpose of informing the public about the legal process. There is no First Amendment right to belittle one's opponent without legitimate tactical reason, nor to obstruct questioning, during the course of legal proceedings.

On the other hand, this case *is* about a pattern of offensive conduct over several years. The complaint alleges that it is respondent's actions "in aggregate" which violated the Michigan Rules of Professional Conduct. The Master considered respondent's aggregated conduct in finding violations of the Rules.

It was not immediately obvious to the Panel that we can or should adopt this approach - that is, to analyze respondent's conduct in toto rather than deposition by deposition. After a good deal of deliberation, we conclude that we both have the authority to consider the aggregate, and we should do so in this case.

To the best of our knowledge, there is no Attorney Discipline Board or judicial precedent in Michigan that is directly on point. However, a New York case, *Matter of Robert A. Kahn*, 791 NYS2d 36 (2005), seems to support this approach. The respondent in *Kahn* was disciplined for a pattern of offensive comments to other attorneys over the course of multiple proceedings.

We also note that there is no apparent difference in principle between aggregating several instances of inappropriate actions during a single proceeding to determine whether there is misconduct, and aggregating several such instances over multiple proceedings. Like the Master, we find it instructive that the Board found that it was the aggregate of offensive speech during a proceeding which constituted misconduct in *Administrator v. Beer*, 93-234-GA. Also, although the Board did not explicitly state that it was considering several incidents *in toto* when it found misconduct in *Administrator v. Warren*, 01-16-GA, it did review the conduct in this way. We therefore conclude that in appropriate cases, we have authority to assess misconduct by looking at aggregated rather than individual actions.

There are probably circumstances where it would not be appropriate to aggregate actions over time to determine whether an attorney committed misconduct. However, that is a question which we need not explore, because we find that this is a case in which aggregating respondent's conduct is the right way to proceed. We do so because we believe there is a cumulative effect of respondent's misbehavior. That is, even if we assume, for the sake of discussion, that the administration of justice was not quite prejudiced enough to constitute misconduct as the result of

any single instance of respondent's verbal abuse of opposing counsel, we believe that his engaging in a pattern of like conduct has a significantly greater negative impact on the administration of justice than does any single such instance.[3]

For instance, respondent's repeatedly embarrassing a particular attorney has a greater negative impact than does his doing so a single time. Respondent's bringing disrespect to the administration of justice in front of a cumulative dozen witnesses and other participants in the legal process has a greater impact than his doing so in front of one or two persons. The repetitious nature of respondent's actions created at least one additional impact. The record shows that among some attorneys, respondent had a reputation for making personal attacks.[4] That reputation would naturally make it more likely that opposing counsel would begin a deposition with respondent with a heightened sensitivity to potentially insulting or obstructive conduct, thereby increasing the potential that the deposition will be disrupted or terminated as a result of a bad interaction between counsel, or that there will be other negative consequences. Finally, respondent's repeated abusive conduct shows a greater disrespect to other participants in the legal system than does a single instance of abusive conduct.

Therefore, we do consider respondent's conduct in the aggregate. Once we do, Board precedent reassures us that the Master was correct in determining that this conduct violated MRPC 8.4(a). *Administrator v. Segel*, 95-210-GA, concerned a respondent who, during the course of a deposition, swore at opposing counsel and questioned his competence and ethics. The Board reversed a panel decision which had found that this was not misconduct, holding that these actions, in the course of a deposition (as distinguished from a private exchange) were prejudicial to the administration of justice.

Segel is a persuasive indication that respondent also committed misconduct. While the words respondent used were not quite as profane as those at issue in *Segel*, respondent's statements were more prejudicial to the administration of justice than were those at issue in *Segel*, since they were deliberately insulting (rather than the result of an uncontrolled outburst),[5] they were demeaning in multiple depositions rather than just a single hearing, and he respondent was obstructive, in addition to being insulting.

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3 When we suggest the possibility that, on the facts of this case, no single instance of respondent's abusive conduct, standing on its own, rises to the level of a violation of the rules, we do not mean to suggest that we think respondent behaved appropriately. Rather, we are reflecting a reality that no one - not this Panel, not the Board, not the Grievance Administrator and not the Bar - wants every literal violation of the MRPC to be the subject of disciplinary proceedings. To prevent that, opinions sometimes say that certain inappropriate conduct does not violate the rules, when what really seems to be meant is that in the judgment of the Board, the particular infraction was not serious enough to warrant disciplinary proceedings. So it is here. We think respondent violated the rules of professional conduct every time he deliberately insulted or embarrassed opposing counsel. However, we would be reluctant to find that a single instance of this sort of insult was serious enough to warrant invoking the disciplinary process.

4 See n.14, below.

5 It is significant that, unlike *Administrator v. MacDonald*, this case is about public statements during legal proceedings. *Cf.* 00-4-GA. While there are undoubtedly situations in which even a private conversation between attorneys could be so disrespectful or offensive that it would rise to the level of misconduct, offensive private conversations are less likely to impact the administration of justice than is demeaning an opponent during official proceedings in the presence of third parties who have no choice but to be present, such as witnesses, clients and court reporters.

We also find it useful to turn the question around: Can we say that a lawyer who deliberately and repeatedly embarrasses, demeans and obstructs opposing counsel through the use of inappropriate language in the presence of witnesses, court reporters and parties has *not* acted contrary to the administration of justice? We cannot imagine that the answer to this question is "yes." For this reason, too, we conclude that the Master is correct.

Respondent raises several challenges to the Master's conclusions. He characterizes the many statements which the Master found to be deliberately insulting as "situations in which respondent made statements in response to those initiated by other participants in the depositions in order to clarify the record or otherwise protect his clients' interests." (Brief in Support of Respondent's Objections to Master's Report at 1.) Respondent's own testimony did attempt to establish this point. Indeed, we found his testimony noteworthy for the fact that, in his effort to establish this point, respondent did not acknowledge that he made a single inappropriate comment in any of the many instances in which the Master found or the Administrator alleged that his comments were a part of a pattern of misconduct - not when he called opposing counsel a nitwit and told the client that he should get another lawyer;[6] not when he repeatedly called opposing counsel an asshole and accused him of acting like a hyena and an idiot;[7] not when he called another opposing counsel an idiot;[8] not when he told opposing counsel (who objected to respondent's mid-deposition complaints about the location of the deposition) that he was yelling like "a madman" and "a crazy man";[9] not when he called opposing counsel a buffoon;[10] not when he told opposing counsel that she was stupid and shameful, that it was pathetic that her client was paying for her representation, and she had better behave;[11] not when he told another opposing counsel that he was shameful, and that he could not handle the truth;[12] not when he told opposing counsel to get his "stink" out of a deposition,[13] not in any of the other many instances of disruptive, patronizing or insulting conduct that were cited by the Master or that appear in the exhibits - in fact, not ever.

We reject this defense as a matter of both fact and law. As to the facts, our review of respondent's testimony convinces us that the Master was correct that respondent's rationalizations for these and other comments ring very hollow. For one thing, one gets the clear impression that respondent was being less than candid with the Master when he testified about his motives for making the inappropriate comments he did. But, whether or not he was being candid, his testimony completely fails to establish that he had a legitimate purpose for the many comments which the Master and we find to be improper. Although respondent characterizes his remarks as justified responses to instigation by opposing counsel, our own review of the record shows that respondent's statements were never justified, and most often, it was actually respondent himself who initiated and perpetuated the interaction in which he behaved unprofessionally. See, e.g., Exhibit I at 4; Exhibit K at 57, 64; Exhibit M at 19. Accordingly, just as the Master did not accept respondent's "lengthy and at times tiresome justifications" for his conduct, neither do we. (Report at 12.)

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6 Exhibit A at 91.
7 Ex. Q at 6-8.
8 Exhibit I at 4.
9 Exhibit E at 89, 90.
10 Exhibit C at 20.
11 Exhibit L at 38-39, 43, 64.
12 Exhibit O at 87-88.
13 Hearing 2/24/04 at 5-6, 11.

Even if the record reflected that respondent really was provoked to make his unprofessional and insulting comments, as he claims, we would still be required to reject his defense as a matter of law. See *Administrator v. Fink*, 96-181-JC (1998), in which the respondent defended against a charge of misconduct, which was based on his assaulting a witness at a deposition, by arguing that the witness had provoked him (the witness had called respondent a "lying son of a bitch" and similar terms). The Board held that provocation is no defense to misconduct. The same is true here.

Respondent argues that most of the attorneys who were the victims of his verbal abuse did not themselves think he committed misconduct.[14] The opinion of a victim that respondent was not attempting to embarrass or belittle him might be relevant in the context of the charges here, but it does not appear to us that any of the victims testified to that effect. On the other hand, to the extent that any victim gave an opinion as to the ultimate question, whether respondent's actions constituted misconduct, that opinion is irrelevant.[15] As the Grievance Administrator notes, only the Master (and now the panel) have had the benefit of reviewing evidence, considering precedent and weighing the pattern of respondent's conduct.

Moreover, the testimony of the few victims of respondent's attacks who were called as witnesses cannot fairly be characterized as opining that respondent did not commit misconduct. Mr. Morganti was the opposing counsel in the *Moir* deposition, Exhibit A. Our review of that deposition shows that without significant provocation, respondent referred to Mr. Morganti as a

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14 Respondent also suggests that the Grievance Administrator could only find questionable conduct in about 16 of the more than 1000 depositions he has conducted. There is no evidence in the record that anyone made any systematic effort to review respondent's depositions to identify all in which he insulted or demeaned his opponents, or to determine whether those which are not the subject of this proceeding reflect proper conduct. Therefore, to the extent respondent is suggesting that we should infer that he behaved properly in all depositions that are not the subject of the charges brought by the Grievance Administrator, there is an inadequate foundation for that conclusion.

Indeed, to the extent the record establishes anything about the depositions which are not the subject of the complaint, it *dis*courages us from inferring that respondent conducted himself appropriately in them. The record shows, for example, that respondent was alleged to have behaved profanely and inappropriately in another deposition in the matter of *Coleman v. Wasserman.* (Hrg. 6/16/04 at 55-56, 67-68.) And the opposing counsel in that matter noted that the events captured in Exhibit C were "typical of what has transpired in depositions in our cases. I have not taken a deposition, sir, where you have not made a personal insult to some attorney in the room or the witness." (Exhibit C at 23.) *See also* Exhibit B at 111 (after series of personal and degrading comments exchanged between counsel, opposing counsel informs respondent that his reputation is that he behaves this way with every defense attorney).

We do not rely on this evidence concerning other depositions to establish the misconduct we find in this case. We note that the record of the uncharged *Coleman* incident is incomplete (the only portion of deposition transcript that is referenced refers to respondent stating that opposing counsel has blown something out of his ear, but does not purport to include the alleged profanities). We cite this evidence only to illustrate why we are unwilling to assume, as respondent asks, that respondent behaved appropriately in every deposition which does not form part of the complaint.

15 That is especially the case here, where the misconduct rests on the aggregate of respondent's actions in multiple depositions. No one victim was aware of that aggregate, so no one victim was in a position to express a meaningful opinion.

nitwit and told Mr. Morganti's client that the client should get a new lawyer. (Exhibit A at 87-91.) Mr. Morganti understood respondent to be mocking him, and thought respondent was either trying to provoke him or intimidate him. He considered respondent's actions to be a violation of the MRPC. (Hrg. 2/23/04 at 57.) However, in response to a question from respondent's counsel, he testified that he did not consider this to be the sort of violation he was *required* to report to the Grievance Administrator by MRPC 8.3. (Id. at 61.) In explaining why he chose not to file a grievance, he also testified that he did not want to become embroiled in a dispute with respondent that would redound to the detriment of his client. (Id. at 57.) It does not follow that Mr. Morganti believed that respondent had acted properly under the rules.

It is also obvious that Mr. Rinkle, the opposing counsel in the greatest number of the depositions in which respondent engaged in the conduct which we find to be improper, was under the impression that respondent did violate the MRPC. As the Master notes, the fact that Mr. Rinkle did not perceive that he was obligated, under Rule 8.3, to file a complaint any sooner than he did, does not suggest that he thought respondent's conduct was acceptable under the rules.[16]

Respondent argues that he cannot have prejudiced the administration of justice because all of the depositions in question actually proceeded to conclusion. Respondent relies on too narrow a definition of prejudice. When the improper conduct of an attorney causes a loss of respect for the judicial process or opposing counsel, the administration of justice has been prejudiced even when a deposition is completed. The administration of justice is also prejudiced when the improper conduct of an attorney intimidates a witness or a party. As noted elsewhere in this opinion, respondent apparently developed a reputation for making personal attacks on opposing counsel.[17] That reputation created a climate which increased the odds that future depositions would be interrupted or terminated as a result of a bad interaction between counsel.

We are satisfied that respondent's repeated personal attacks on opposing counsel had this impact. As the Master noted, depositions, where there is no judge to umpire the proceedings, are no place for insulting, patronizing, scolding or lecturing. See *Grievance Administrator v. Segel*, 95-210-GA. "[W]e can envision no case in which it would be proper to insult, belittle, or demean any person . . . . " *Weiand v. Florida*, 701 So2d 562, 565 (Fl. Ct. App. 1997), *rev'd on other grounds*, 732 So2d 1044 (Fl. S. Ct. 1999).[18] The Maryland Court of Appeals squarely rejected the argument that the administration of justice is not prejudiced when inappropriate speech is used during legal proceedings:

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16 Respondent also argues that another opposing counsel, George Zemnickas, testified that he thought there was no misconduct during the deposition that is recorded in Exhibit E. (Respondent's Objections to Master's Report at 3 n.5.) However, a review of Mr. Zemnickas's testimony shows that in procuring this testimony counsel for respondent had focused Mr. Zemnickas on a less offensive part of respondent's conduct than that in which respondent accused Mr. Zemnickas of "yelling like a madman" and "continuously yelling like a crazy man." (Hrg. 2/23/04 at 74.) Counsel for respondent never asked Mr. Zemnickas whether he considered these latter comments to be misconduct.

17 See n.14, above.

18 Respondent notes that *Weiand* was a criminal case, not one that involved attorney misconduct. He is correct, but that has little bearing on the legitimacy of *Weiand*'s observation about proper attorney conduct.

> That such conduct does not at the moment of its occurrence delay the proceedings or cause a miscarriage of justice in the matter being tried is not the test. Conduct of this type breeds disrespect for the courts and for the legal profession. Dignity, decorum, and respect are essential ingredients in the proper conduct of a courtroom, and therefore in the proper administration of justice. [*Attorney Grievance Commission v. Stuart L. Alison*, 317 Md. 523, 536 (Md. Ct. App. 1989).]

Respondent contends that finding that the administration of justice has been prejudiced by his conduct so expands the concept of prejudice that it will chill aggressive advocacy. We disagree. The linchpin of the Master's finding, which we adopt, is that respondent deliberately and in a calculated fashion insulted and demeaned his opponents and obstructed their questioning of witnesses. There is no risk that future litigants will confuse aggressive advocacy with deliberately insulting and obstructive advocacy.

Similarly, respondent contends that he was only attempting to protect his clients' interests. This justification also rings hollow. As the Master found, in the circumstances presented here respondent had no need deliberately to insult or obstruct any opponent in order to protect any of his clients' legitimate interests.

Respondent suggests that the Master has "decried" him because he was "passionate," "engaged" and "on the switch." (Brief at 7.) That is not accurate. The Master found that respondent deliberately insulted and obstructed his opponents, and that his doing so was calculated. She specifically found that his actions were not the result of passion, and the evidence supports her finding.[19]

For all of these reasons, we find that respondent's comments during the depositions referred to by the Master were prejudicial to the proper administration of justice, in violation of MRPC 8.4(c) and MCR 9.104(A).

We also find that respondent's conduct violated MRPC 6.5(a). Rule 6.5(a) states in part that "a lawyer shall treat with courtesy and respect all persons involved in the legal process." The Master was reluctant to find a violation of Rule 6.5, a reluctance which was understandable because the outer contours of the rule are not immediately clear and there is little precedent concerning its application. Although we understand her concern, we reach a different result.

In reaching that result, we now reject respondent's contention, raised in a pre-hearing motion to dismiss, that Rule 6.5 is unconstitutionally vague or overbroad. Respondent argues that a reasonable person cannot know what conduct is forbidden by Rule 6.5(a). To support his argument, he posits a series of hypothetical ways in which a lawyer's words might or might not be considered "disrespectful." For example, he worries that under Rule 6.5(a), a lawyer might be charged with misconduct for failing to tip his hat to a litigant, or failing to wish a "good morning" to a judge, failing to salute an officer or failing to say "god bless you" after someone sneezes, and other similar concerns. (Brief in Support of Motion for Summary Disposition at 2-3.) Respondent argues that from the uncertainty surrounding his hypothetical examples it follows that Rule 6.5 is invalid.

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19 The Master's finding No. 9 noted that respondent behaves very differently depending on whether he is in a deposition or before a judge, and summarized the evidence which supports this finding. This was part of the reason the Master concluded that respondent acted with deliberation, rather than out of passion.

In this case, of course, the Master did not find that respondent failed to tip his hat or otherwise failed to live up to some arbitrary standard of respect. Rather, she found that respondent repeatedly and deliberately embarrassed and demeaned opposing counsel. That makes this case similar to *Grievance Administrator v. Warren*, 01-16-GA, decided after respondent challenged Rule 6.5(a) in this case, in which the Attorney Discipline Board considered and rejected essentially the identical argument:

> The Board has also considered respondent's argument that Michigan Rule of Professional Conduct 6.5(a) is unconstitutional for the reason that it suffers the fatal defects of vagueness and overbreadth. . . . The challenge before the Board is . . . with respect only to the first sentence of MRPC 6.5(a) which states: "A lawyer shall treat with courtesy and respect all persons involved in the legal process." While respondent raises many interesting and thought-provoking hypothetical situations which explore the gray areas between "courtesy" and "discourtesy," and "respect" and "disrespect," it is not necessary for the Board to venture into those areas in this case. This is not a case about failing to salute an officer, or failing to tip one's hat, or failing to say "God bless you" after someone sneezes. This is a case about a lawyer's yelling, screaming, belittling, harassing and threatening conduct. . . .
>
> The Board declines, therefore, to consider whether or not MRPC 6.5 as written is overly broad or vague when applied to hypotheticals of the type offered by respondent. The respondent's conduct, as found by the hearing panel, would clearly be covered under even the most narrow interpretation of that rule. See *In re Chmura*, 461 Mich 517, 544 (2000). [*Warren*, *supra*, pp 5-6.]

We similarly decline respondent's invitation here. We believe that deliberately embarrassing and demeaning opposing counsel during depositions would be covered under even a narrow interpretation of Rule 6.5(a).

We also think the rule is not reasonably susceptible of the concern expressed by respondent. That is, we think the most natural interpretation of Rule 6.5(a) provides a reasonable degree of notice and certainty. We understand the rule to be primarily directed to those situations in which an attorney *deliberately* demeans or embarrasses or is discourteous to another participant, for no legitimate tactical reason, in a legal matter in which the attorney is also engaged.[20]

The goal of Rule 6.5(a), to require attorneys to maintain a degree of civility in the practice of law, is certainly important to the efficient and effective functioning of the legal system and to maintaining respect for that system. This is a reasonable limitation on attorney conduct.

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20 Cf. MRPC 4.4 ("a lawyer shall not use means that have no substantial purpose other than to embarrass . . . another person"). The alternative to Rule 6.5(a), it seems to us, is that the Bar cannot have a meaningful rule which requires attorneys to treat others with civility and respect. We think such a rule serves a worthwhile purpose in regulating the conduct of the Bar, and see no good reason why it should be unconstitutional to regulate attorney behavior in this way.

"Membership in the Bar is a privilege burdened with conditions." *In re Rouss*, 221 NY 81, 84 (1917)(Cardozo, J.). "Upon admission to the Bar, a lawyer accepts and agrees to be bound by rules of conduct significantly more demanding than the requirements of law applicable to other members of society." *Commissioner v. Alison*, 317 Md. at 535. Rule 6.5(a), as we understand it, is a reasonable means to achieve that goal, especially in the context of judicial proceedings, such as the depositions that are the subject of this case. "It is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to 'free speech' an attorney has is extremely circumscribed." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1071 (1991).

Having accepted the Master's well supported finding that respondent deliberately embarrassed and demeaned his opposing counsel more than a dozen times during depositions, we are compelled to then conclude that respondent did not treat his opposing counsel with the minimal courtesy and respect required by Rule 6.5.

Finally, we consider separately respondent's filing Exhibit N in the *Evans* case. On July 5, 2001, respondent participated in a deposition of a nurse.[21] The audiotape of the deposition is Exhibit S. The tape reveals that during the deposition respondent became displeased that opposing counsel was objecting to some of his questions. Respondent made some mildly denigrating remarks, to which opposing counsel took exception. There was a brief and mildly heated exchange, after which opposing counsel gathered his composure and was prepared to proceed. The tape shows that rather than continue the deposition, respondent continued to speak in a demeaning way and with a condescending voice to opposing counsel, with the apparent intent of provoking a further response. No response was forthcoming, and respondent abruptly terminated the deposition notwithstanding opposing counsel's willingness to continue.

The next day respondent filed a motion in the Evans matter in which, among other things, he sought a protective order which would remove opposing counsel from the case and compel the continuation of the deposition with an armed deputy sheriff present. In support of the motion, respondent alleged that during the deposition the day before, opposing counsel,

> unprovoked and for reasons unknown, became belligerent, hostile, and launched into a maniacal tirade; yelling, screaming and gesturing in a threatening fashion (the transcript and audio tape of this shameful display will be provided to the Court) . . . . It is apparent that [opposing counsel] is mentally disturbed and poses a present danger to [respondent] and others . . . . This is not the first time that [respondent] and the Court have been the brunt of [opposing counsel's] psychotic tantrums . . . .

In other words, respondent unjustifiably provoked an incident during the deposition, inflamed that incident when it was in danger of cooling down, then mischaracterized both the origin and nature of the incident as the basis for unfairly disparaging opposing counsel in a written pleading.[22]

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21 The cover page of the transcript, Exhibit M, asserts that the deposition took place on *June* 5, not July 5. This appears to be an error.

22 Respondent's treatment of opposing counsel in Exhibit N is strikingly similar to his treatment of a different opposing counsel, at a different time, in connection with a different deposition, as embodied in Exhibit U.

The Master found "overwhelming evidence" that the portions of Exhibit N just described were included in the motion merely to harass and intimidate opposing counsel. (Finding of Fact 10.) Based on that finding, the Master concluded that the filing of Exhibit N violated MRPC 4.4. It is not clear whether the Master found that the filing of this motion also violated Rules 6.5(a) and 8.4(c).

Rule 4.4 states that a lawyer shall not use means that have no substantial purpose other than to embarrass a third person. Respondent objects to the Master's conclusion. He asserts, asserting that Exhibit N was filed to prevent opposing counsel from yelling at respondent in a future deposition. The Master concluded that respondent's testimony in this regard was "specious." (Report, Finding of Fact 10.)

By way of background for this other incident, in 1997 respondent participated in the deposition of a medical expert. (Exhibit C.) The Master found that respondent's conduct during this deposition was a part of the pattern of insulting and embarrassing behavior that violated the MRPC. (Finding of Fact #2 n.2)

Exhibit C, beginning at p. 10, demonstrates that the pertinent exchange with opposing counsel was triggered at the beginning of the deposition in question when opposing counsel attempted to have the expert identify the records on which the expert had relied. Respondent interrupted to answer the question himself, and refused to relent even when opposing counsel repeatedly stated that he wanted the expert to testify rather than respondent. Respondent then told opposing counsel to "be quiet" and to "shut up" when opposing counsel asked that the testimony come from the expert. The transcript does not reflect that opposing counsel said anything particularly exceptional during the exchange that followed, but respondent nonetheless told opposing counsel that he would not sit for counsel having a tantrum like a three year old; that opposing counsel was acting like a child, like a little two year old throwing a tantrum who should be embarrassed and ashamed of himself; that opposing counsel was an embarrassment to the profession and that he was shameful; that he had become uncontrollable; that he was acting like a buffoon; and again that he had acted like a little child. (Exhibit C at 14-24) Exhibit C also makes clear that respondent was very patronizing toward opposing counsel throughout the exchange.

Following this deposition, respondent filed a motion for a protective order. In that motion, respondent alleged that:

> without provocation opposing counsel "flipped out" during the deposition and became incensed for no reason, his face flushed with anger and was working himself into a lather. . . . [Respondent] cautioned him to collect himself . . . . This only further enraged defense counsel, now with his head engorged with blood and his hands trembling . . . . That moment came when despite [respondent's] repeated plea for restraint, defense counsel began screaming and wailing away like a maniacal mad man. . . . Such ghoulish conduct on the part of defense counsel should not be tolerated in a civilized society. [Exhibit U.]

In other words, as with Exhibit N, it appears to us that respondent provoked opposing counsel into a reaction, fanned the flames of that reaction with offensive and patronizing language, then filed a motion in which he mischaracterized both the cause of the incident and the nature of opposing counsel's conduct during the incident, on which basis he impugned the mental status of opposing counsel. Although Exhibit U is not part of the charged misconduct here, it helps to demonstrate that respondent's filing of Exhibit N was no accident, but was another deliberate attempt to embarrass an opponent.

We also believe that the cited portions of Exhibit N, which were a deliberate attempt to embarrass opposing counsel in connection with a legal proceeding, violated respondent's duty under Rule 6.5 to treat opposing counsel with courtesy and respect. Finally, we believe that impugning the mental stability of a member of the Bar, without legitimate cause, in a public pleading, prejudices the due administration of justice by unfairly breeding disrespect for the legal profession and exposing the profession to contempt, in violation of Rule 8.4(c) and MCR 9.104(2).

Having concluded that respondent did commit misconduct in the particulars described above, this matter will be set for a hearing to determine the appropriate sanction.

ATTORNEY DISCIPLINE BOARD
Tri-County Hearing Panel #15

By: _____
Lynn A. Helland, Chairperson

APPENDIX 3

STATE OF MICHIGAN

Attorney Discipline Board

GRIEVANCE ADMINISTRATOR,
Attorney Grievance Commission,

Petitioner,

v

Case No. 02-78-GA

ALBERT J. DIB, P 32497,

Respondent.
_____/

REPORT ON DISCIPLINE OF TRI-COUNTY HEARING PANEL #15

PRESENT: Lynn A. Helland, Chairperson
Michael J. Balian, Member
Carl L. Bolden, Jr., Member

APPEARANCES: Nancy Alberts, Associate Counsel
for the Attorney Grievance Commission

Michael A. Schwartz
for respondent

I. EXHIBITS

None

II. WITNESSES

Hon. Dawn Marie Gruenburg
Gerald Allen Shiener
Fred Dilley
Albert Dib

III. HEARING PANEL REPORT ON MISCONDUCT

On July 3, 2006, the hearing panel filed its report on misconduct, finding that the charge in the complaint, that respondent deliberately embarrassed and belittled his opponents during fourteen depositions and in a filed pleading, were all established.

On this basis, we found that respondent engaged in professional misconduct in violation of MRPC 6.5(a) and 8.4 (a) and (c), and MCR 9.104(A)(4).

IV. REPORT ON DISCIPLINE

A. Panel Proceedings

The panel convened on September 27, 2006, to conduct a separate hearing on discipline, as required by MCR 9.115(J)(2).

The Grievance Administrator offered no additional evidence tending to show aggravating or mitigating circumstances. Counsel did note that the panel found that respondent had deliberately violated the Rules of Professional Conduct, and had deliberately treated the disciplinary process with a lack of candor. Counsel argued that ABA Standard 6.21 states that a reprimand is an appropriate remedy only when an attorney *negligently* violates the rules of professional conduct, while ABA Standard 6.22 states that suspension is the appropriate remedy for a *deliberate* violation. Therefore, the Administrator argued, suspension is the appropriate remedy here. The Administrator took the position that Mr. Dib should be suspended for a period long enough to require him to apply for reinstatement to practice law, to require him to demonstrate that he had indeed come to understand and renounce the behavior on which the finding of misconduct was based, and contended that a six month suspension was the minimum necessary to accomplish that purpose.

Respondent called three witness in addition to himself. Hon. Dawn Gruenberg testified that in her experience, respondent has been among the most ethical attorneys she has known. She and Dr. Gerald Shiener testified that in their experience, respondent did not behave in the manner he was found to have behaved by the panel. Fred Dilley, Esq., testified that in his opinion the panel was mistaken to conclude that respondent's actions were unprofessional. Mr. Dilley stated that Mr. Dib might push the envelope of professionalism in his zealous advocacy, but in Mr. Dilley's opinion he did not leave the envelope.

Respondent testified that for much of his career he has engaged in a variety of activities to improve the practice of law and promote the Wayne State University law school. He testified that he suffered from medical problems, one consequence of which is that he became impatient at depositions. He testified, contrary to the panel's finding, that he was justified in filing Exhibit N (the pleading in which, as the panel found, respondent made unfounded allegations concerning the mental status of his opponent, after having deliberately precipitated the incident on which the pleading was based). He testified that his only motive, in all the instances in which the panel found misconduct, was to represent his clients with zeal. He described his impression that he is at a disadvantage when pursuing the interests of his clients, because of the vast array of resources opposing him, and suggested that this perception that he is an underdog contributed to his approach in depositions. In response to cross-examination, it was not clear whether respondent acknowledged that he had engaged in inappropriate conduct.

Counsel for respondent noted that respondent has no prior disciplines in 25 years of practice. He noted that respondent did not have a dishonest or selfish motive for his actions. Counsel took the position that respondent cooperated with the proceedings, and to the extent the panel was of the opinion that respondent was less than candid about his actions, counsel asserted that respondent was not trying to deceive, but was merely taking a "subjective view" of his own actions. Counsel also took the position that respondent did not initiate any of the situations that gave rise to the panel's findings of misconduct. For all of these reasons, counsel for respondent argued that the sanction should be no more than a reprimand.

The panel in this case also has the benefit of the recommendation of the Special Master. The Master, who had the opportunity to observe respondent first-hand over the course of eleven days of hearings, acknowledged that it was not part of her mandate to recommend a sanction, but nonetheless suggested that suspension would not be appropriate.

B. Findings and Conclusions

The panel is obligated to use the American Bar Association's Standards for Imposing Lawyer Sanctions following its finding of misconduct. *Grievance Administrator v Lopatin*, 462 Mich 235 (2000). In that opinion, the Supreme Court laid out the steps we must follow, which include identifying the ethical duty violated by the lawyer; identifying the lawyer's mental state; determining the extent of the actual or potential injury caused by the lawyer's conduct; and, finally, considering appropriate aggravating and mitigating factors.

With *Lopatin* in mind the panel finds that ABA Standards 6.22 and 7.2 guide our decision. That is, we have already found that respondent deliberately took actions in several depositions which caused or potentially caused interference with legal proceedings (Standard 6.22), and which violated his duty as a professional and thereby caused damage or potential damage to the legal system (Standard 7.2).

Both of these Standards state that suspension is "generally" the appropriate remedy for a violation. However, for the reasons that follow, we conclude that a reprimand, rather than suspension, is the appropriate sanction in this case.

First, although it is inherently difficult to measure an intangible injury such as the harm to the legal profession or interference with legal proceedings as a result of respondent's conduct, our sense is that in this case the harm and potential harm were small.

Second, we accept respondent's characterization of his actions as resulting from a desire to be a zealous advocate. We recognize that few past Board opinions have grappled with the line we wrestled with here, that is, the line between zealous and over-zealous advocacy. In light of the absence of clear precedent we are reluctant to suspend an attorney for crossing that line, even an attorney who did so repeatedly over a period of years.

We also find support for a reprimand, rather than suspension, in the fact that respondent has had no prior finding of misconduct (ABA Standard 9.32(a)), and was not operating from a selfish or dishonest motive (ABA Standard 9.32(b)).[1]

The Grievance Administrator has quite properly noted that there are two significant aggravating factors which we must consider. As we noted in our opinion finding misconduct, respondent appeared to be "less than candid" in his testimony before the Master. ABA Standard

[1] Although respondent offered evidence suggesting that his actions may have resulted in part from certain physical disabilities which cause him to be ill-tempered, see ABA Standard 9.32(h), we discount that factor in our decision. Respondent testified at length concerning his actions, and his motives for his actions, during the hearings before the Master. He never hinted then that his actions were even improper, much less that any impropriety was the result of a physical problem. Accordingly, we give that factor no weight in our decision now.

9.22(f) states that it is an aggravating factor for a respondent to engage in deceptive practices during a disciplinary proceeding. In addition, as the Grievance Administrator notes, even as of the sanction hearing respondent appeared to take the position that, in his mind, he had done nothing improper. ABA Standard 9.22(g) states that refusal to acknowledge wrongful conduct is also an aggravating factor.

After considering these aggravating factors, we conclude that they do not warrant a suspension in this case. We are certainly troubled by respondent's apparent inability to acknowledge that he acted inappropriately. And we are mindful that in past cases, a lack of candor with the administrative process was a basis for the Attorney Discipline Board to significantly increase sanctions that were otherwise appropriate. *See, e.g., Grievance Administrator v. Levant*, 94-200-GA (1996)(Board increased suspension from 30 days to two years because respondent repeatedly lied to the panel during the disciplinary process); *Grievance Administrator v. Whelan*, 92-231-GA (1993)(Board increased sanction from reprimand to 60 day suspension because of respondent's demonstrated disdain for the disciplinary process); *Grievance Administrator v. Meden*, 92-106-GA (1993)(in the course of increasing a sanction from 18 month suspension to revocation, the Board stated: "we can conceive of few factors deserving of greater weight in aggravation than a finding that an attorney has given false testimony during disciplinary proceedings").

Nonetheless, we conclude that on the rather unique facts of this case, no increase is warranted on this basis. While we were left with the impression that respondent was not candid when describing the conduct which resulted in charges being brought against him, we are mindful, as noted by respondent's counsel, that respondent was testifying as to a particularly subjective matter - his motivation for his actions. We are not as comfortable aggravating the sanction on this basis as we would be had respondent testified falsely as to something more objective than his state of mind. In reaching this conclusion, we note as well that the Master, who had the opportunity to see respondent testify in person and similarly appeared to be troubled by that testimony, nonetheless recommended that a reprimand is the appropriate sanction.

As to respondent's unwillingness to acknowledge that he acted unprofessionally, it appears to us as though respondent may simply be incapable of acknowledging personal wrongdoing. Were we to conclude, from that, that respondent is likely to be a repeat offender, we would consider this inability to be a serious aggravating factor. However, our perception is that no matter the extent to which respondent may engage in word games with the panel, or the grievance administrator, or the Master, in lieu of addressing the propriety of his actions, in reality he is not likely to be a repeat offender. If we are wrong in that regard, his future misconduct can appropriately be dealt with in a future proceeding.

For all of the reasons just stated, we do not believe respondent should be suspended from the practice of law. On the other hand, we believe that any sanction less than a reprimand would understate the seriousness of respondent's deliberate and repeated actions, and would encourage him to continue to deny his misconduct to himself. Accordingly, having carefully weighed all of these factors, we conclude that respondent should receive a reprimand.

V. SUMMARY OF PRIOR MISCONDUCT

None

VI. ITEMIZATION OF COSTS [MCR 9.128 - As Amended July 29, 2002]

Attorney Grievance Commission:	
(See Itemized Statement filed 10/18/06)	$ 511.36
Attorney Discipline Board:	
Hearing held 3/03/03	$ 297.56
Hearing held 7/15/03	$ 170.31
Hearing held 2/23/04	$ 610.00
Hearing held 2/24/04	$ 998.00
Hearing held 5/14/04	$ 595.00
Hearing held 5/25/04	$ 318.00
Hearing held 6/15/04	$ 728.00
Hearing held 6/16/04	$ 308.00
Hearing held 7/09/04	$ 391.00
Hearing held 8/25/04	$ 485.00
Hearing held 8/26/04	$ 562.50
Hearing held 10/15/04	$ 227.00
Hearing held 10/18/04	$ 302.00
Hearing held 10/31/05	$ 335.00
Hearing held 9/27/06	$ 369.00
Administrative Fee:	$1,500.00
TOTAL:	**$8,689.73**

ATTORNEY DISCIPLINE BOARD
Tri-County Hearing Panel #15

By: _____
Lynn A. Helland, Chairperson

DATED: NOVEMBER 22, 2006