STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellant - Cross-Appellee,

v

Kenneth P. Williams, P-55790,

Respondent/Appellee - Cross-Appellant,

Case No. 03-80-GA

Decided: July 6, 2005; Corrected Opinion Issued July 7, 2005

Appearances:

Cynthia C. Bullington, for the Grievance Administrator
Dennis A. Dettmer, for the Respondent

BOARD OPINION

Respondent was found to have committed misconduct by placing opposing counsel's name on a stipulation to adjourn a hearing without actually speaking to counsel and under various circumstances explained further below. By a two-to-one vote, the hearing panel concluded that respondent's particular misconduct warranted a reprimand under the ABA Standards for Imposing Lawyer Sanctions and in light of the mitigating factors. A dissenting panel member would have imposed a suspension of 91 days. The Grievance Administrator petitioned for review, arguing that respondent should be suspended for a minimum of 180 days. Respondent cross-petitioned for review, arguing that admonition or no discipline should have been ordered. Upon careful examination of the whole record, and having considered the nature of the misconduct in this case, we conclude that the panel's decision to reprimand respondent is appropriate and consistent with the Standards, and we affirm the panel's order of discipline.

I. Facts.

The facts in this case are essentially undisputed. Respondent was confronted with a scheduling conflict between a jury trial in Wayne Circuit Court and a pretrial in 54-B District Court in East Lansing. He instructed his assistant to contact opposing counsel in the district court matter,

and she tried repeatedly, using an incorrect phone number. Respondent then made his own attempts to reach opposing counsel during the two business days before trial (respondent tried Thursday and Friday; the conflicting district court pretrial and circuit court jury trial were on the following Monday). Respondent finally got through to UAW-GM Legal Services, but he "was unable to find anyone willing to take a message," (Report on Misconduct, p 5), and opposing counsel had no voicemail. Finally, respondent prepared a stipulated order of adjournment because he "had been advised by a clerk that a stipulated order of adjournment had to be entered if respondent wanted to get the pre-trial adjourned." *Id.* He had his assistant sign for opposing counsel and set forth a reference to his own letter as authority for the signature. That is, the stipulation says, immediately next to opposing counsel Mabin's signature line and hand-written name, "w/ permission from Kenneth P. Williams - per letter." Respondent's December 6, 2002 letter was addressed to counsel (and faxed with the stipulation). The letter stated that respondent had been trying to reach counsel, that he had signed opposing counsel's name, and that if opposing counsel had any problem with this, he should contact the court directly.

The letter and stipulation were faxed to opposing counsel's office at 4:44 p.m. on Friday, December 6, 2002, and opposing counsel received them that day. When opposing counsel received the letter and stipulation, he understood that the authority for affixing his signature stemmed from respondent's own letter and "he thought someone was unilaterally trying to get an adjournment of a pretrial conference and schedule it during a time when I was going to be on vacation."

Respondent went to the jury trial in Wayne County Circuit Court on that Monday. His opposing counsel went to the district court pretrial conference and explained that he didn't sign the stipulation or authorize it, and clarified that the court had not instructed respondent to sign counsel's name. The court learned that respondent was in circuit court. "[S]ince [respondent's] failure to appear seemed reasonable at the time, [opposing counsel] had no problem with it being adjourned to a later date," and the court rescheduled the pretrial. (Tr 9/10/03, p 66.)

Respondent missed that adjourned date and a default judgment was entered against his client. Respondent moved to set aside the default judgment, but the motion was denied. Respondent's assistant at the time testified that the office practice was for her to write court dates in an attorney's day book and enter them in ABACUS, a computerized calendaring system (Tr 9/10/03, pp103-104). She entered the adjourned date in respondent's book (*Id.*). Respondent testified that he looked at the ABACUS printout in preparation for the week's hearings and, on the day of the adjourned

pretrial, finished a deposition out of the office, called the office to see "what was going on," and then went home. When he learned that he missed the pretrial, respondent spoke with his assistant and showed her the ABACUS printout. She responded by telling him that she had written the date in his book. (Tr 9/10/03, pp 130-131.)

II. Hearing Panel Findings & Conclusions.

Respondent did not contest the factual charges in the formal complaint. At the hearing on misconduct, the panel heard from the district court judge, court personnel, opposing counsel, respondent and his assistant. The panel issued a report finding misconduct on all charges in the formal complaint, including neglect for missing the first pretrial (Report on Misconduct). The panel noted that respondent "has all the trappings of a fine lawyer," and noted "his candor and forthrightness in the attorney discipline process." At the same time, the panel "condemned [respondent] for his duplicity, dishonesty, lack of ethics, and seeming inability to appreciate even now the gravity of his actions in the judicial process" (Report on Misconduct, p 8).

After a separate hearing on discipline in which judges and lawyers, including respondent's employer, testified as to respondent's character and professionalism, the panel issued a reprimand (with the condition that respondent attend a course on legal ethics) by a vote of 2 to 1 (Report Relating to Discipline). In this report, the language about dishonesty is largely absent. In its place are references to testimony by the seven witnesses "who testified very favorably to the legal skills, demeanor, attributes, reliability, honesty and general good character of respondent as a lawyer" (*Id*., p 3). In reprimanding respondent, the panel majority relied on Standards 4.43 (reprimand for neglect or lack of diligence) as well as 5.1 and 6.1, both of which deal with misrepresentation and related conduct. In particular, the panel quoted (but did not cite with specificity) Standard 5.13 (reprimand) for failure to maintain personal integrity, and Standard 6.13 (also reprimand) for submitting false statements to a court.

Despite favoring a suspension, the dissenting member did not seem to have a substantially different view of the nature of the offense or of the respondent's character. He agreed with the majority that the standards could prescribe a reprimand (or, in his view, a suspension) for the neglect charges (missing the pretrial hearings). However, he would have applied Standard 5.11 or 5.12 and Standard 6.12. Under Standard 5.1 he "would rate [respondent] deserving of disbarment

or a period of suspension." Applying Standard 6.1, he "would rate respondent as deserving a suspension under Standard 6.12," and he further states:

> I do not feel that the evidence establishes that respondent intended to deceive the court, and thus disbarment under Standard 6.11 is not appropriate.[13]
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> [13] By that same token, I do not feel that respondent acted with "malice," in that he was trying to trick the Court into believing that he had a valid stipulation. In his own mind, it seems, respondent truly thought he was acting appropriately. Thus, there seems to be no subjective intent to do wrong.
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> [Dissenting Report on Discipline, p 5. Emphases in original.]

As for mitigation, the dissenting panel member cited "testimony of all the witnesses [which] was essentially all the same": "Respondent is an honest, reputable person, a man of his word, and the consummate professional" (Dissent, p 3. Internal quotation marks and footnotes omitted.) The dissent also "agree[d] with the mitigating factors the majority has outlined" (Dissent, p 6). Finally, while discounting the factor of inexperience in light of respondent's several trials in two-plus years of practice at the time, the dissent stated:

> On the other hand, his character and reputation, by all accounts is otherwise outstanding. One witness testified to Respondent's religiosity, so perhaps a verse of scripture is in order: "Let the mouths of another praise you, not your own." (Proverbs 27:2.) Respondent presented an impressive array of people willing to state that he was an honest, reputable person. It cannot go without mention that many of those who sing Respondent's praises are his professional adversaries, and some are judges before whom he has practiced. These words of praise and commendation bear great weight, as they evidence confidence of those in the very system itself to stake their own reputations on the Respondent. Thus, I find no aggravating factors. Respondent's otherwise sterling reputation is a major factor in mitigation. [Dissenting Report on Discipline, pp 6-7.]

Finally, the dissenter rejected the Administrator's request for a suspension of 180 days because "Respondent was simply not of an evil mindset when he engaged in his unethical conduct." *Id*., p 7. But, the dissenting panelist concludes that a "reprimand is not severe enough," and states that he would impose a 91 day suspension.

III. Appropriate Level of Discipline.

A. Missed Pre-Trial Hearings.

At the outset, we will briefly address the finding of "neglect" or lack of diligence. Respondent missed the district court's pretrial conference on Monday, December 9, 2002. This was, however, part and parcel of respondent's misguided plan to generate a self-executing stipulation for adjournment without objection so that he would be free to attend the trial scheduled in circuit court that day. Although the record establishes that respondent diligently attended to his client's file, he missed the second pretrial as the result of a scheduling error in his office. Respondent argues that this conduct warrants only an admonition.[1] The Administrator cites Standard 4.42(a) (suspension generally appropriate when lawyer knowingly fails to perform services for client and causes injury or potential injury to client). The panel did not find that respondent knowingly failed to perform services for his client, and the Administrator does not contend that the record lacks proper evidentiary support for the panel's findings in this regard. Thus, we find no basis for increasing discipline under Standard 4.42(a). As to respondent's claim that admonition is appropriate, we reiterate our holdings that hearing panels and this Board do not have the power to issue admonishments. See, e.g., Grievance Administrator v Gregory S. Thompson, 97-68-GA (ADB 1998). And, we reject respondent's contention that the Court's adoption of the ABA Standards on an interim basis in Grievance Administrator v Lopatin, 462 Mich 235, 238 (2000), amounts to a repeal of MCR 9.106(6) which vests in the Attorney Grievance Commission the sole authority to issue admonitions. See also, Grievance Administrator v Ralph E. Musilli, No. 98-216-GA (ADB 2000), p 7 n 1 (post-Lopatin decision declaring that panels are not empowered to issue admonitions). Finally, we do not reach the question whether an order of "no discipline" would be appropriate for this type of omission in light of the fact that this case has focused primarily on the conduct surrounding the submission of the stipulation and the level of discipline imposed in this case will not be significantly affected by the charges relating to the missed pretrial conference.

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[1] Respondent notes the panel's unanimous conclusion that little or no injury was caused by the scheduling error even though it led to entry of a default judgment, and cites ABA Standard 4.44 which provides: "Admonition is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes little or no actual or potential injury to a client."

B. Discipline for the Misleading Stipulation.

Two standards are employed by the parties and the panel in assessing the appropriate discipline for submission of the stipulation: Standard 5.1 (dealing with criminal and dishonest acts) and Standard 6.1 (dealing with false submissions to a court).

The Administrator relies upon Standard 5.12 in arguing for a suspension.[2] That Standard does not expressly reference dishonest acts, but only speaks of certain criminal conduct. We have observed elsewhere that apparent gaps in the intended coverage of Standard 5.1 render it somewhat difficult to apply, and that it is likely that ABA Standard 5.12 was intended to apply to certain dishonest conduct as well as the criminal conduct mentioned therein.[3] Our proposed Standard 5.12

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[2] ABA Standard 5.1 reads, in part:

> 5.11 Disbarment is generally appropriate when:
> (a) a lawyer engages in serious criminal conduct, a necessary element of which includes intentional interference with the administration of Justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or the sale, distribution or importation of controlled substances; or the intentional killing of another; or an attempt or conspiracy or solicitation of another to commit any of these offenses; or
> (b) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.
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> 5.12 Suspension is generally appropriate when a lawyer knowingly engages in criminal conduct which does not contain the elements listed in Standard 5.11 and that seriously adversely reflects on the lawyer's fitness to practice.

[3] See the *Report of the ADB to the Michigan Supreme Court Regarding Proposed Michigan Standards for Imposing Lawyer Sanctions* (June 2002). See also, Grievance Administrator v Arnold M. Fink (After Remand), 96-181-JC (ADB 2001), in which opinion the Board noted:

> [The] effort to place a particular case in the appropriate spot along the continuum [between Standard 5.11 and 5.12] is somewhat hampered by the fact that the text of the standards do not consistently describe the conduct to which they are applicable. For example, under 5.11(b), disbarment is deemed appropriate for intentional dishonest conduct seriously reflecting adversely on fitness to practice, whether or not the conduct is criminal. However, Standard 5.12 appears on its face to be applicable only to criminal conduct (with additional elements involving fitness), whereas the text of Standard 5.13 (dishonesty and similar conduct that adversely reflects on fitness) does not specifically reference criminal conduct. It is unlikely that the Standards were meant to suggest that criminal conduct not meeting all of the elements of Standards 5.11(a) and 5.12 must always escape discipline altogether or that dishonest non-criminal conduct should only be the subject of a disbarment order or a reprimand, and not a suspension.

would cover dishonest conduct,[4] and we presume that the Administrator reads the current ABA Standard as if it were intended to apply similarly.

Like the panel's reports, the Administrator's arguments can be seen to contain different views of the misconduct. At its worst, the misconduct could be viewed as knowingly deceptive. But, other arguments and analyses by panel members and the Administrator paint the conduct as misleading and more likely the product of negligence.

As noted above, the panel majority applied Standard 5.13.[5] The dissent argued that disbarment or suspension is implicated by the criminal conduct provisions of Standard 5.11(b) or 5.12. The dissenter writes: "Signing another person's name, without that person's permission has all the trappings of forgery" (Dissent, p 5). As authority, the dissent cites a case stating: "It is the essence of forgery that one signs the name of another to pass it off as the signature or counterfeit of another." (*Id.*)

This matter is in no way comparable to forgery cases decided by this Board, such as Grievance Administrator v Allan G. Meganck, No. 03-125-GA (ADB 2004) (respondent created two false mortgages with forged notarizations and, in one instance, a false Wayne County Register of Deeds stamp, including fictitious liber and page numbers, with the expectation and hope that they would be relied upon as genuine legal documents), Grievance Administrator v G. Scott Stermer, 01-3-JC (2003) (forgery of a court order in an attempt to deceive a district court judge as to the true status of his client's driving record), and Grievance Administrator v Mary E. Gerisch, ADB 171-87 (ADB 1988) (respondent "manufactured a false settlement check and settlement statement in support of a claim to the client and the Attorney Grievance Commission that the case had been settled").[6] These and other forgery cases are clearly distinguishable from the instant matter. If the respondent

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[4] Suspension is generally appropriate when:

* * *

(b) a lawyer engages in conduct involving dishonesty, fraud, deceit, or knowing misrepresentation that reflects adversely on the lawyer's fitness to practice [ADB Proposed Standard 5.12(b)].

[5] "Reprimand is generally appropriate when a lawyer knowingly engages in any other conduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law."

[6] The Administrator's brief states that attorney Gerisch fabricated documents to conceal her misappropriation of client funds. Brief on "Appeal," p 12 n 10. No misappropriation was alleged or found in that case.

in this case had written nothing but opposing counsel's name on the signature line then this case might present a forgery. If he had written, "w/permission from [opposing counsel] on [date]," that would also be false. However, those dishonest acts were not committed here.

In ordering a reprimand based on Standard 5.13, the majority necessarily concluded that respondent *knowingly* engaged in conduct involving misrepresentation, and that it adversely reflected on his fitness to practice law, but that it did not *seriously* adversely reflect on his fitness. The panel's conclusion that this incident does not seriously adversely reflect on respondent's fitness is supported by the record, including the following items: (1) the fact that the stipulation itself pointed its readers to the letter in which respondent spells out his basis for submitting the stipulation and invites counsel to contact the court with any objections; (2) weighty and credible character testimony; (3) counsel for the Administrator's concession that "but for Mr. Williams' inexperience we probably wouldn't have seen this type of situation," and that he "has the potential of being a very good lawyer one day," who exercised "very poor judgment" and "intentionally chose the wrong course to proceed" (Tr 2/12/04, p 301); and, (4) respondent's current assessment of how he got into this situation and what to do in the future:

> I thought I could have had this adjourned because we were making calls to the court, and I honestly thought it would have been something that opposing counsel would have agreed to. But again, there was no significant contact made with opposing counsel and I didn't get approval to adjourn it, and it was at that point earlier in the week I should have raised a red flag all around, hey, I have a problem coming up, my whole head is geared towards trial, somebody's just got to take this file for next week, I can't even address this. [2/12/04, p 294.]

Standard 5.13 recommends reprimand (instead of admonishment) based in part upon the fact that a respondent acted knowingly. It is possible that the panel majority found that respondent knew he was submitting a document captioned "stipulation" without express authority but also that he did not possess the specific knowledge of its impropriety, or its capacity to mislead or the specific intent that it do so. This would be consistent with the panel's additional reliance on Standard 6.1 in issuing its reprimand.

The panel majority essentially quoted[7] Standard 6.13, which reads:

> 6.13 Reprimand is generally appropriate when a lawyer is negligent either in determining whether statements or documents [being submitted to a tribunal] are false or in taking remedial action when material information is being withheld and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.

The dissent applied Standard 6.12, which provides:

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

The dissent's recitation of the elements of the standard did not mention remedial action (Dissent, p 5), and it could be argued that respondent's letter itself in part remedied or prevented reliance upon the misleading "stipulation." Also, although the dissenting panel member did conclude that respondent "was not negligent in his course of conduct, but was very deliberate," the dissenter also found that respondent did not intend to deceive the court, that he did not have an "evil mindset," and that in his own mind respondent thought he was acting appropriately.

With regard to false representations to a tribunal, the this Board affirmed a reprimand for misrepresentation to a hearing panel that an affidavit had been signed in the presence of a notary in Grievance Administrator v William Fischel, ADB 227-87 (1989).

Cases involving the submission of improperly notarized (and therefore false) documents to a court have resulted in reprimands or orders imposing no discipline. See, e..g, Board order after remand in Grievance Administrator v Bowman, 97-290 (ADB 2001) (citing Fischel and reprimanding respondent under Standard 6.12 for directing secretary to notarize "signature" of absent party and submission to court); Grievance Administrator v O'Brien, 99-124-GA (HP 2001) (order imposing no discipline after Board remand for assisting improper notarization and submission

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[7] The panel used the word "neglectful" instead of negligent.

to court; panel recognized inability to impose admonishment, but, finding Standard 6.14 most applicable, imposed no discipline); Grievance Administrator v V. Paul Donnelly, No. 35637-A (ADB 1979) (signing client's name to affidavit, even with a valid power of attorney, was "faulty practice and bad form," but given "the factual context . . . no discipline [was] warranted" and dismissal was affirmed). *Compare* Grievance Administrator v David C. Ritchie, 99-123-GA (HP 2000) (reprimand for attorney's signing two client's names to affidavit with their permission, but then having notary swear they appeared and submitting affidavit to court).

Also, respondent cites Grievance Administrator v Knerly, DP 172/84 (ADB 1985) (respondent, without authorization, signed ["affixed a simulated signature"] on five probate documents; the Board reduced the panel's suspension of 90 days to a reprimand), and the consent discipline in Grievance Administrator v Randa, 03-21-GA (HP Consent 2003) (client signed names to bankruptcy pleading without authorization).

We rarely quote at length from a party's brief, but respondent's brief on review in this case so accurately describes the nature of the misconduct, respondent's mental state, and the impact of his actions that we find extensive quotation entirely appropriate:

> Clearly, Mr. Williams was not seeking to gain tactical advantage in the litigation, but rather, he recognized the situation as one in which opposing counsel's consent to an adjournment is routinely granted as a matter of professional courtesy, and thus, Mr. Williams genuinely expected and fully anticipated that opposing counsel would in fact consent to the adjournment, particularly in light of the established practice which gives precedence to a circuit court trial over a pre-trial hearing in the district court. Still, Mr. Williams was negligent, and acted unreasonabl[y], both in failing to recognize that the remedial actions he did take were insufficient to justify his conduct in proceeding without the express permission of opposing counsel, and also in failing to take further remedial action so as to completely remove any possibility that the court might be misled.
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> Simply stated, Mr. Williams should have contacted the district court a second time, to advise that he had been unable to reach Mr. Mabin and inform him of the scheduling conflict, or he should have asked the circuit judge to contact the district court and advise that court of the scheduling problem. By merely assuming Mr. Mabin would not object to an adjournment of the pre-trial hearing – then writing to Mr. Mabin, fully informing him of his actions, and suggesting that Mr. Mabin should contact the court directly if he did object – there remained a possibility that, if Mr. Mabin did not receive the

> correspondence, or was unable to contact the court, then the court might conclude, incorrectly, that Mr. Mabin consented to the stipulation. Mr. Williams, however, had honestly believed that Mr. Mabin would either consent to adjourn the pre-trial hearing at his earliest opportunity, upon learning of the scheduling conflict, or that he would contact the court and object, such that the court would not be misled in either event.
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> As it turned out, the court was not misled, because Mr. Mabin did receive the correspondence from Mr. Williams indicating the manner in which he had proceeded, and Mr. Mabin then acted on the information he received from Mr. Williams to advise the court of the situation, just as Mr. Williams had suggested he do in the event he had any objections. While these facts do not serve to excuse Mr. Williams' conduct, they do demonstrate that Mr. Williams did not act with a dishonest motive, and that he had no specific intent to deceive.

We find this recitation to be a valid summary of the record, and one which is consistent with the panel's ultimate view of the facts in this case as is reflected by the entirety of the panel's writings (including the dissent) and the decision of the majority to apply Standard 6.1.

D. Mitigation & Lack of Aggravation.

The panel was unanimous in its finding that there were no factors in aggravation. The most critical mitigating factors have essentially been integrated into the panel's assessment of the nature of the misconduct and our own. The panel majority found, among other things, no dishonest or selfish motive in respondent's actions (Standard 9.32(b)); effort to rectify the situation (Standard 9.32(d)); full and free disclosure and cooperation in the discipline proceedings (Standard 9.32(e)); supervision apparently insufficient in light of his experience (compare Standard 9.32(f)); interim steps to address the underlying causes of the problem – respondent seeking more guidance and the firm reducing caseloads where possible (Standard 9.32(j)); and, genuine remorse (Standard 9.32(l)).

IV. Conclusion.

This case involves the submission of a document captioned "stipulation" when it was not based on an agreement with opposing counsel. This was inappropriate. However, the unique facts of this case are readily distinguishable from cases involving the fraudulent submission of documents with forged signatures.

Based on the record evidence, the panel's findings, and the panel's application of the Standards and our own, we conclude that a reprimand in this case is appropriate, proportional and just discipline for respondent's error in judgment.

Board members Theodore J. St. Antoine, William P. Hampton, Marie E. Martell, Jr., George H. Lennon, Billy Ben Baumann, M.D., Lori McAllister, and Hon. Richard F. Suhrheinrich concur in this decision.

Board Member Reverend Ira Combs dissents and would impose a suspension of 90 days for the reasons stated by the dissenting hearing panel member.