STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellant-Cross Appellee,

v

Travis W. Ballard, P-32805,

Respondent/Appellee-Cross Appellant,

Case Nos. 02-19-AI; 02-25-JC

Decided: February 21, 2003

Appearances:
Patrick K. McGlinn, for the Grievance Administrator.
Michael Alan Schwartz, the respondent.

BOARD OPINION

Respondent was convicted by a jury of breaking and entering with intent to commit larceny, MCL 750.110; entry without permission, MCL 750.115; and carrying a concealed weapon, MCL 750.227. The concealed weapon and breaking and entering offenses are felonies. Accordingly, respondent was automatically suspended on March 8, 2002, the date of his convictions in the Lenawee County Circuit Court. MCR 9.120(B)(1). The Grievance Administrator filed a Notice of Filing Judgment of Conviction on March 26, 2002, and a hearing panel conducted a hearing on several days in June and July, 2002. The panel suspended respondent for a period of 15 months, commencing March 8, 2002, and ordered that respondent comply with various conditions relating to his continuing medical treatment. Respondent petitioned for review, arguing that the discipline was too severe. The Administrator filed a cross-petition contending that respondent's license should be revoked. We affirm.

The record discloses that the respondent, Travis W. Ballard, was a domestic relations attorney in Adrian specializing in fathers' rights issues. His wife, Linda, was employed in his office as a secretary. On February 15, 2001, while the respondent was in court, his wife came across a Valentine's Day wish in the local newspaper. Linda Ballard testified that the greeting was to her

husband from a woman whose relationship with the respondent had been the source of ongoing marital discord. After calling a local attorney, Margaret Noe, Mrs. Ballard "started gathering up paperwork and things like that that I would take because I figured once I left the office that day, I wouldn't be going back." (Tr, p181.) In addition to financial records, including the entire billing package for the respondent's clients, Mrs. Ballard gathered other material from the office, placed it in four storage containers and a plastic bag, and loaded the boxes into her SUV. Mrs. Ballard filled out a personal protection order form at Attorney Noe's office, went to pick up her children at school, and then returned to Ms. Noe's office where she left the material she had gathered from her husband's law office.

The respondent first learned of the Valentine's Day greeting, and his wife's reaction, while returning to Adrian from a court appearance in Howell. In his testimony to the hearing panel, the respondent described his telephone calls to friends and associates in an attempt to contact his wife and children; his return to his home in Adrian where he began brandishing one or more hand guns in an apparently suicidal manner; and, eventually, his retrieval of a telephone message to Linda Ballard from Attorney Noe. Acting on the belief that his wife was consulting with Ms. Noe about divorce proceedings, the respondent drove first to Ms. Noe's home and then to Ms. Noe's office.

Seeing a light in the office, the respondent went to the door of the building, found it unlocked, and walked in. He testified that when no one answered his call, he looked into Ms. Noe's office and saw the four boxes which he recognized as containing his office records. He further testified to the panel that he then gathered up the boxes and the plastic bag containing mail addressed to his office and took them out to his car.[1] He testified that he opened a drawer of Ms. Noe's desk but took nothing belonging to her or any of her clients. The respondent returned to his home where he began burning file folders (but not the files themselves) in his backyard until he was approached by various police officers, including the Lenawee County Sheriff. The respondent was handcuffed and taken by ambulance to the Herrick Hospital Stress Unit in Tecumseh. From there he was transferred to St. Joseph Mercy Hospital in Ypsilanti where he spent three to four weeks followed by one or two weeks at the Huron Oaks Facility. (Tr, p 315.)

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[1] During this trip to Ms. Noe's office, the respondent was accompanied by another attorney, Janet Harsh. However, the record discloses that Ms. Harsh remained in the respondent's car when they arrived at Ms. Noe's office and did not accompany the respondent into the building.

The respondent was subsequently charged with one count each of the felony offenses of breaking and entering with intent to commit larceny; breaking and entering - entry without breaking with intent; and carrying a concealed weapon. On March 8, 2002, a jury in Lenawee County Circuit Court, returned guilty verdicts on counts one and three together with a verdict of guilty as to count two of the lesser included offense of entry without permission. The respondent was sentenced on April 11, 2002 to 90 days in jail (with credit for 36 days served) and five years probation. The record discloses that respondent spent 75 days in jail.

The Administrator argues that revocation is called for under the ABA Standards for Imposing Lawyer Sanctions. Specifically, the Administrator contends that the applicable Standard is 5.11, which provides:

> 5.11 Disbarment is generally appropriate when:
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> (a) a lawyer engages in serious criminal conduct, a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or ***theft***; or the sale, distribution or importation of controlled substances; or the intentional killing of another; or an attempt or conspiracy or solicitation of another to commit any of these offenses; or
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> (b) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer*s fitness to practice. [ABA Standard 5.11; emphasis added.]

By contrast, Standard 5.12 provides that, "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." As noted above, the panel imposed a 15-month suspension.

Urging disbarment under Standard 5.11, the Administrator argues:

> Respondent's criminal conduct has the requisite element of theft/larceny. He committed the B&E with the intent to commit larceny, as the verdict establishes. Further, he actually removed items from the office. The B&E with intent to commit larceny is actually a more serious crime for sentencing purposes than simple larceny from a building, as it also involves the unlawful entry. [Petitioner's Brief in Support of Review, p 7.]

It is not entirely clear from the foregoing whether the Administrator is arguing that respondent actually committed a theft. The Administrator does assert that items were removed from attorney Noe's office, and it is undisputed that respondent took his own records, removed from his office by his wife earlier that day. Respondent contends, however, that one cannot steal one's own property, and the Administrator does not answer respondent's citation to People v Christenson, 412 Mich 81, 87; 312 NW2d 618 (1981), for this proposition. Nor does the Administrator squarely contend that a theft occurred. Rather, the Administrator relies solely on the elements of the crimes for which the respondent was convicted by a jury.

Unquestionably, the entry of a certified copy of the judgment of conviction from the Lenawee County Circuit Court constituted conclusive proof of the respondent's commission of those criminal offenses. MCR 9.120(B)(2). However, it does not necessarily follow that once the criminal conviction has been established, a hearing panel or the Board may not consider the respondent's actual conduct, as established in the record, in analyzing the appropriate level of discipline under the ABA Standards.

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.").

Thus, even when the technical elements of a theft are shown, this Board and "[t]he hearing panels are not absolved of their critical responsibility to carefully inquire into the specific facts of each case merely because the administrator initiates disciplinary proceedings by filing a judgment of conviction, under MCR 9.120(B)(3)." Grievance Administrator v Deutch, 455 Mich 149, 169 (1997).

The Standards, like Deutch, encourage a thoughtful application of standards, precedent, and any such guidepost for the reason that "attorney misconduct cases are fact sensitive inquiries that turn on the unique circumstances of each case." Deutch, 455 Mich at 166. For example, Standard 5.1 speaks of sanctions generally appropriate for a "criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer *in other respects* . . . ," (emphasis added), thus indicating that it is significant when a lawyer's misconduct stemming from personal affairs has the potential to spill into the practice setting and place clients at risk.[2] Also, Standard 5.1 and all others refer to "the factors set forth in Standard 3.0," one of which is actual or potential injury.

The parties' briefs on review do not focus on the nature or seriousness of the harm in this case. However, in his sanction brief to the hearing panel, the Grievance Administrator noted that the respondent violated another lawyer's office, removed items from the office without permission and "rifled through her desk where privileged materials were." Of these, it is clear from the panel's report that the panel was most troubled by the fact that a lawyer would enter another lawyer's office without permission. As for the other two factors identified, it seems relevant to us that the items which Mr. Ballard removed from Ms. Noe's office had, in fact, been removed without permission from his office earlier that day and they were his files. There is no finding in the record that he removed property belonging to anyone else. Nor is the record on the allegation clear that Mr. Ballard "rifled" through Ms. Noe's desk. He testified to the panel that he opened the center drawer of the desk to seek if his computer discs were there. Ms. Noe testified that other drawers were disturbed. The panel made no finding on this issue.

A mechanical or automatic application of ABA Standard 5.11(a) for all conduct characterized as "theft" would suggest that disbarment is generally appropriate whenever a lawyer has engaged in a petty act of shoplifting, any removal of another's property or, as in this case, the removal or taking back of one's own property so long as some type of "theft" has been found by a judge or jury. We are not sure that this was the result intended by the ABA's House of Delegates when it adopted the Standards in February 1986 and we are skeptical that Standard 5.11 establishes a presumptive level of disbarment in every case involving the commission of a criminal act defined as a "theft." Leaving that skepticism aside, however, we conclude that even if application of the

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[2] Of course, a lawyer is a lawyer is a professional "twenty-four hours a day, not eight hours, five days a week," Matter of Grimes, 414 Mich 483; 326 NW2d 380 at 384 (1982), but the nexus or potential nexus of criminal or other "personal" misconduct to the practice obviously has a bearing on the level of discipline.

Standards is conducted under Standard 5.11, revocation of the respondent's license to practice law is not compelled in this case.

A critical factor in the proper application of the ABA Standards is the consideration of the relevant aggravating or mitigating circumstances. In this case, there is ample evidence in the record of significant mitigating factors warranting our consideration. Of the factors identified by the respondent, two are particularly relevant: the existence of personal or emotional problems suffered by the respondent [Standard 9.32(c)] and the evidence that the respondent suffered from a mental disability which caused the misconduct whether respondent is in recovery, the misconduct has been arrested and recurrence is unlikely [Standard 9.32(i)].

Dwarakanath G. Rao, M.D., first saw respondent at the in-patient unit of St. Joseph Mercy Hospital during the week following February 15, 2001. He testified as to his diagnosis of bi-polar illness and respondent's subsequent treatment which included psychotherapy and a prescription for Depakote, described as a mood stabilizer. Dr. Rao testified:

> My opinion is that there is no doubt in my mind that this manic depressive tendency played a huge role in the events that took place that week, perhaps even those few months surrounding the incident; that is, he went from - he went from being distressed and being worried to feeling the only way to get out of the situation was to take - make - basically engage in high end risky behavior that ordinarily he would have thought many times over. And it's very consistent with the way manic depressive illness presents itself.
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> I would say with a high degree of certainty that I don't think he would have engaged in the behavior that he led to in the pleadings had he not had the disorder. I don't think he would have been calm, I don't think he would have been feeling great, but I don't think he would have been in the fix that he got himself into. (Tr, pp 32-33).

The Administrator counters that: Standard 9.32(b) is inapplicable because a conviction for breaking with intent to commit larceny establishes a selfish motive; Standard 9.32(c) is inapplicable because respondent's personal or emotional problems were a result of his own doing; Standard 9.32(e) is inapplicable in light of respondent's problems testifying at a hearing, desire to reschedule hearings, and conduct and suicidal statements leading to his admission to a hospital "stress unit"; and, Standard 9.32(i) is not applicable because respondent has not established causation, has never been subjected to an independent medical or psychological examination, and respondent has not shown a sustained period of recovery or that recurrence of his problems is unlikely.

The Administrator also argues that the following aggravating factors are present: a dishonest or selfish motive, Standard 9.22(b) ("Respondent's criminal conduct served to benefit himself while harming others."); multiple offenses, Standard 9.22(d) (respondent was convicted of three separate crimes); refusal to acknowledge the wrongful nature of his conduct, 9.22(g) (Respondent has refused to apologize to attorney Noe because she accused him of taking papers from a file in her office[3]); and, substantial experience in the practice of law, Standard 9.22(i).

For his part, the respondent urges consideration of the following factors recognized as having a mitigating effect in the ABA Standards: absence of a dishonest or selfish motive, Standard 9.32(b) (respondent argues that he went to Ms. Noe's law office looking for his wife and there is no evidence that he entered those offices for any other reason); personal or emotional problems, Standard 9.32(c) (emphasizing the respondent's then undiagnosed and untreated bi-polar syndrome); free and full disclosure to the disciplinary authorities, Standard 9.32(e); character or reputation, Standard 9.32(g) (four lawyers, a probate judge, and three former clients testified on respondent's behalf); mental disability under the conditions described in Standard 9.32(i); the imposition of other penalties or other sanctions, Standard 9.32(k) (in addition to spending 75 days in jail, the respondent testified as to the financial and emotional toll resulting from his conviction); and his remorse, Standard 9.32(l).

Having carefully weighed all of the aggravating and mitigating circumstances and having considered the nature of the respondent's conduct on the night of February 15, 2001 as explicated in the record below, we are left with a firm conviction that the hearing panel's decision to impose a 15 month suspension accompanied by conditions pertaining to his continuation of medical treatment was in accord with the ABA Standards for Imposing Lawyer Sanctions and is appropriate in this case.

It does not appear that the panel excused the respondent's conduct nor does it appear that the panel ignored its critical responsibility to carefully inquire into the specific facts of the case. Grievance Administrator v Deutch, 455 Mich 149, 169 (1997). Not only will the respondent's license to practice law in Michigan remain suspended until he is able to establish his fitness to practice law to a hearing panel, the Attorney Discipline Board or the Supreme Court in reinstatement

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[3] There was testimony to the effect that a trust document prepared for Judge Pickard by attorney Margaret Noe was missing from Noe's office after respondent's visit and that respondent took it. Respondent disputed this and he was not charged with this in criminal or discipline proceedings and no finding was made that this occurred.

proceedings governed by MCR 9.124, but the respondent will not be eligible to even file a petition for reinstatement without a showing that he has continued a regimen of medication for treatment of his medical condition and that he is willing to provide the records pertaining to his medical treatment during his suspension. The panel's order reflects an obvious desire to impose a level of discipline which recognizes that protection of the public is the paramount goal of these proceedings and the panel's decision is affirmed.

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