STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellee,

v

Brian J. McKeen, P 34123,

Respondent/Appellant,

Case No. 00-61-GA

Decided: May 7, 2003

Appearances:
Ruthann Stevens, for Grievance Administrator, Petitioner/Appellee
Michael Alan Schwartz, for the Respondent/Appellant

BOARD OPINION

The hearing panel found unanimously that the respondent "grasped" opposing counsel's tie at a deposition but did not pull on it in a "threatening and assaultive manner" as charged in the formal complaint. By a vote of two to one, the hearing panel concluded that the respondent's conduct warranted a reprimand. The dissenting panel member concluded that "notions of justice and fairness" of the type described by our Supreme Court in Grievance Administrator v Deutch, 455 Mich 149; 565 NW2d 369 (1997), would justify the entry of an order of discipline which, in fact, ordered "no discipline at all" Deutch, 455 Mich 163. The respondent has petitioned for review by the Attorney Discipline Board on two grounds: (1) that the conduct found by the hearing panel did not constitute professional misconduct, and (2) that if misconduct was established, the panel should have entered an order imposing "no discipline." The Attorney Discipline Board has conducted review proceedings in accordance with MCR 9.118, and concludes that the order of reprimand should be affirmed.

The facts, which are not disputed, are set forth in the panel's report on misconduct, attached hereto as appendix A. Our discussion of the applicable law will be brief in light of the

comprehensive discussion of the pertinent questions in the outstanding majority and dissenting reports on discipline, attached as appendix B and appendix C, respectively.

The formal complaint charged that, during a May 5, 1999 deposition, respondent "challenged" his opposing counsel "to a physical altercation" (¶10(a)), and "grasped [opposing counsel's] tie, and pulled on it in a threatening and assaultive manner" (¶10(b)). At the hearing on misconduct, the complainant, respondent, and the court reporter testified. In a carefully crafted, thorough report on misconduct, the panel set forth its findings that the allegations in ¶10(a) were not proven, and that only ¶10(b)'s allegation that respondent "grasped" opposing counsel's tie was proven.

The panel also observed: "It is a sad commentary on the current state of the practice of law that there is a developing caselaw on assaults, abusive language, and other incivilities occurring in the course of depositions." After discussing several of this Board's decisions, the panel placed this case in context: "We recognize that the grievousness of Respondent's conduct in this case fell far short of that which was held improper in other cases."

Summarizing its findings and its legal conclusion that misconduct occurred, the panel wrote:

> The Formal Complaint also alleged that Respondent "grasped Attorney Paterra's tie, and pulled on it in a threatening and assaultive manner." (Formal Complaint, ¶ 10(b).) Respondent admits that he grasped Mr. Paterra's tie, and it is that act which forms the basis for our finding of misconduct. The most disputed fact in the entire hearing was what Respondent did with the tie after having grasped it. As noted above, we have concluded that Respondent certainly did not pull the tie "in a threatening or assaultive manner." (Id.) We conclude that Respondent either let the tie drop from his hand, or, at most, gave it a slight pull. This interpretation of events is based on what the court reporter observed (a single, slight pull on the tie). In fact, what the court reporter saw may well have been Respondent simply letting the tie drop from his hand, as he testified, which in the heat of the moment could have been confused with a slight tug. Nonetheless, even the slight, uninvited and unwelcome touching was a battery,[5] was certainly prejudicial to the administration of justice, MRPC 8.4(c), and certainly was discourteous to and disrespectful of someone involved in the legal process. MRPC 6.5(a).

[5] See W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 9 (5th ed. 1984) (Battery is an offensive contact with a person, resulting from an act intended to cause the person to suffer such a contact; id and n.8 ("if all other requisites of a battery against the plaintiff are satisfied, contact with the plaintiff's clothing" constitutes battery.); Michigan CJI 2d 17.1 ("A battery is . . . offensive touching of the person or something closely connected with the person of another.")

[November 20, 2001 Panel Report on Misconduct, pp 6-7.]

Although this is a close question, we agree that the uninvited touching of opposing counsel's tie during the deposition is not acceptable, and we conclude that it was prohibited by MRPC 8.4(c) and MRPC 6.5(a). We affirm the panel's conclusion in this regard, even though it appears that respondent is "a capable attorney whose record, based on the evidence before [the] panel, is otherwise good." Majority report on discipline, p 13. Respondent may not have significantly disrupted the deposition in the underlying case, and may not present a threat to the conduct of future proceedings. Nonetheless, we are reluctant to countenance any behavior which has the potential to lead to a physical altercation. Our reasons for taking such a hard line were set forth in Grievance Administrator v Leonard B. Segel, No. 95-210-GA (ADB 1998), the Board explained why certain behavior at a deposition may constitute a violation of this rule:

> The respondent's abusive language toward opposing counsel and the respondent's refusal to surrender documents presented to the deponent by opposing counsel constituted conduct prejudicial to the proper administration of justice in violation of MRPC 8.4(c) and MCR 9.104(1). In reaching this conclusion, the Board notes that the respondent's conduct did not occur during a private exchange between attorneys but was recorded during the course of a deposition conducted in accordance with the Michigan Court Rules. Those rules contemplate a proceeding outside of the presence of a judge or hearing officer during which the parties and their attorneys are nevertheless able to obtain evidence and to make and preserve objections in accordance with the rules of evidence. In addition to his obligations to his client, the respondent had an obligation, as an attorney and officer of the court, to promote the proper administration of justice by conforming his conduct to the well-established norms of practice at a deposition conducted without direct judicial supervision.

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

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[1] ABA Standard 6.2 provides, in part:

6.2 Abuse of the Legal Process

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

(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.[2]

One might expect that, having narrowly concluded misconduct was proven, we would be tempted to mitigate the impact of this decision by entering an order of "no discipline." We decline to do so because we have previously held that: "The imposition of no discipline for established misconduct is an exceedingly rare event." Grievance Administrator v Ralph E. Musilli, No. 98-216-GA (ADB 2000). See also, Grievance Administrator v Bowman, 462 Mich 582, 589 (2000) ("We endorse the following statement made by the ADB: 'The fact that a 'no-discipline' option exists does not mean that it should be employed often. . . . [The] option should . . . be exercised quite sparingly by panels and the Board.'"), citing Grievance Administrator v McFadden, No. 95-200-GA (ADB 1998), lv den 459 Mich 1232 (1998). However, in affirming the majority's reprimand, we wish to emphasize the substantial evidence that respondent is reputed to be a civil and professional litigator, and while we are constrained to condemn his unwise action in grasping or touching his opponent's tie, we do not find a basis in this record to regard him as unprofessional or unethical. Indeed, we recognize that reasonable persons may disagree over whether discipline should be imposed at all, as is demonstrated by the dissent of two of our distinguished colleagues.

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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.

[2] The majority also concluded that respondent's conduct was at least negligent. Majority report on discipline, p 5. The dissenting panel member agreed with this assessment of the respondent's mental state (dissenting report, p 6), but found Standard 6.23 (recommending reprimand for negligent violations of court rules causing injury or potential injury or interference with a proceeding) inapplicable.

Board members Theodore J. St. Antoine, Marie E. Martell, Ronald L. Steffens, Billy Ben Baumann, M.D., and Lori M. Silsbury concur in this decision.

Board members William P. Hampton, and Hon. Richard F. Suhrheinrich concur in the decision to affirm the finding of misconduct, but would issue an order imposing no discipline.

Board members Rev. Ira Combs, Jr., and George H. Lennon were absent and did not participate.

STATE OF MICHIGAN

Attorney Discipline Board

GRIEVANCE ADMINISTRATOR,
Attorney Grievance Commission,

Petitioner,

v

BRIAN J. MCKEEN, P-34123,

Respondent.
_____/

[Entered: November 20, 2001]

Case No. 00-61-GA

REPORT ON MISCONDUCT BY TRI-COUNTY HEARING PANEL #25

At a session of the panel held at 719 Griswold, Ste. 1910, Detroit, Michigan, on July 20, 2001.

PRESENT: Jonathan Tukel, Chairperson
Francis P. Kuplicki, Member
Howard I. Wallach, Member

APPEARANCES: Ruth Ann Stevens, Esq.,
for the Petitioner

Michael Alan Schwartz, Esq.,
for the Respondent.

I. PLEADINGS

Date Filed	Description
04/10/00	Formal Complaint, Discovery Demand
04/11/00	Notice of Hearing, Initial Instruction Sheet
04/12/00	Proof of Service
05/22/00	Notice of Administrative Adjournment Without Date
08/23/00	Default, Affidavit, Proof of Service
08/23/00	Formal Complaint - FA
08/25/00	Stipulation to Set Aside Default (no Proof of Service)
08/25/00	Respondent's Answer to Formal Complaint, Discovery Demand, Discovery Response (no Proof of Service)
09/06/00	Petitioner's Response to Respondent's Discovery Demand, Proof of Service

09/29/00	Petitioner's Motion to Disqualify Hearing Panel Member Gurwin, Proof of Service
11/07/00	Notice of Substitution of Panelist
01/24/01	Notice of Substitution of Panelist
04/04/01	Notice of Hearing
04/16/01	Proof of Service
04/24/01	Notice of Adjournment with New Date

II. EXHIBITS

Number	**Description**
Petitioner's Exhibit 1	Deposition of Dr. Jasvinder S. Dhillon
Petitioner's Exhibit 2	Letter dated June 25, 1999
Respondent's Exhibit 3	Transcript of Protective Order Motion
Petitioner's Exhibit 4	Deposition of Dr. Annamaria Church

III. WITNESSES

1. Joanne Smith;
2. Carmine Paterra; and
3. Brian McKeen, Respondent;

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Attorney Brian J. McKeen ("McKeen" or "Respondent") was charged by formal complaint with having violated Michigan Rules of Professional Conduct 6.5(a) (discourteous conduct), 8.4(a) (violation of a professional rule), and 8.4(c) (engaging in conduct prejudicial to the administration of justice). The allegations centered around the unfortunate conduct engaged in by McKeen and his opposing counsel during a deposition on May 5, 1999.[1] Although the conduct engaged in by all counsel may well have been below that which is required of Michigan attorneys, the sole question before us is whether Mr. McKeen engaged in unprofessional conduct. Finding that he did, we will enter a finding of misconduct, and direct the clerk to schedule a sanctions hearing. MCR 9.115(J)(2).

This case arises from a medical malpractice action. Respondent McKeen represented the plaintiff; Complainant Carmine Paterra was one of the attorneys representing one of the defendants. A series of depositions were taken in the case. The Dhillon deposition was conducted after other depositions already had been taken. Earlier depositions had led to hard feelings

[1]The deposition was of Jasvinder S. Dhillon, M.D., in Hall v. Cottage Hospital, Wayne County Civil No. 98-819843-NH, and is referred to hereafter as "the Dhillon deposition". A transcript of the Dhillon deposition was introduced at the hearing as Petitioner's Exhibit 1.

between the attorneys, as Respondent McKeen believed that at an earlier deposition, Mr. Paterra had improperly attempted to suggest answers to the deponent. (McKeen: Hearing Tr. at 80-82.)

Present at the Dhillon deposition were Respondent McKeen, who represented the plaintiff; Complainant Paterra, who represented one of the defendants; Attorney Bennie L. Grier, who represented the other defendant; and Joanne Smith, the court reporter who transcribed the deposition.

It was McKeen's opinion that, during the course of the Dhillon deposition, Attorney Paterra again engaged in improper witness coaching. (Id at 82-83.) To the extent that it is important to the resolution of this case, the evidence in fact supports McKeen's belief. See, e.g., Petitioner's Exhibit 1, at 8, 16 and 19.

Tension grew throughout the deposition, finally culminating in the following exchange:[2]

MR. PATERRA: Hang on. He just answered that question. You twist and turn and misphrase things throughout this deposition. He said the resident has flexibility as to the plan. Now you're saying the resident –

MR. McKEEN: You don't say a word except objection. This is completely inappropriate.

MR. PATERRA: Bring it in front of the Court.

MR. McKEEN: I will.

MR. PATERRA: I don't appreciate it.

MR. McKEEN: You're a weasel.

MR. PATERRA: You're a bigger weasel.

MR. McKEEN: All right. Let's go.

MR. PATERRA: Sit down.

MR. McKEEN: No, let's go. You don't ever say that to me again ever.

MR. PATERRA: Well, don't say it to me.

MR. McKEEN: Ever. I will say to you –

MR. PATERRA: Let the record reflect that plaintiff [sic] has grabbed my tie around my throat and I will bring a motion for protective order that he no longer presents at any more depositions.

MR. McKEEN: Well, well, well.

[2]The quotation is taken verbatim from the transcript of the Dhillon deposition, Petitioner's Exhibit 1.

MR. PATERRA: You have a lot more coming than you think you do and if this continues, this deposition is going to stop right now.

MR. McKEEN: Listen, I'm representing an injured child. You're trying to coach him through –

MR. PATERRA: This deposition is over. That's bullshit.

MR. McKEEN: This is bullshit.

MR. PATERRA: That's bullshit. Don't you ever touch me again. This deposition is over. Got that? No more questions. Do not answer another question. Bring it –

MR. McKEEN: I didn't touch you.

MR. PATERRA: We have four witnesses here. Bring it in front – in fact, I'm going to bring it in front of the judge.

You're not going to answer any more discussions. You're not going to have any discussions with plaintiff's counsel.

MR. McKEEN: Can I just talk to you for a minute?

MR. PATERRA: No. No way. It' bullshit, Brian.

MR. McKEEN: Let's go off the record a minute.

(Petitioner's Exhibit 1, at 57-59.)

At the hearing, the parties hotly contested the issue of exactly what *physical* contact occurred during the deposition between Respondent McKeen and Complainant Paterra. Respondent admitted that he stood up and wrapped his hand around the middle of Mr. Paterra's tie. Respondent denied having pulled or tugged on the tie, testifying that, after having grasped the tie, he let it drop. Respondent also testified that he regretted his actions as soon as they occurred. (McKeen: Hearing Tr. at 85-86.) Attorney Paterra, by contrast, testified and physically demonstrated that Respondent grabbed the tie just below the knot, close to Paterra's throat, and twice jerked the tie above Paterra's head in violent motions. (Paterra: Hearing Tr. at 25, 37.) The court reporter, Joanne Smith, testified that Respondent held the tie toward the middle, and gave one slight, downward pull on it, in a non-violent manner. (Smith: Hearing Tr. at 19-20.)

Having heard the evidence and having considered the demeanor of the witnesses, the panel finds that Respondent touched the tie a single time, not more than halfway up, did not pull or jerk it violently, and then released it. This conclusion is bolstered by several facts. The testimony of the court reporter belies any claim that Respondent pulled the tie upward, or that he tugged on it twice. Moreover, Mr. Paterra's testimony, beyond the type or number of tugs, simply was not credible as to what took place (as well as a number of other points). Mr. Paterra testified that he was very frightened by Respondent's conduct. However, according to Mr. Paterra, he never stood

or pushed his own chair away. (Paterra: Hearing Tr. at 58.).[3] The panel simply cannot credit Mr. Paterra's testimony as to the violent tugging of the tie in light of the other evidence, as well as his undisputed testimony as to his own actions.

Immediately following the incident, both attorneys met together in the hallway, together with Attorney Grier. That conversation was not transcribed. Both Respondent McKeen and Complainant Paterra testified at the hearing regarding the conversation, however. Based upon the testimony at the hearing, the panel finds that during that conversation, Respondent apologized for his actions and attempted to find a way to resume the deposition. Nonetheless, the deposition did not resume that day. Subsequently, Mr. Paterra filed a motion for a protective order with the Circuit Court. The Circuit Court denied the motion, but as a result of the Court's suggestion made during the hearing on the motion, at least one subsequent deposition was taken in the courthouse. Other depositions since the incident have been taken at the attorneys' offices. The litigation is ongoing.

V. HEARING PANEL REPORT ON MISCONDUCT

Respondent is charged by formal complaint with violations of MRPC 6.5(a), 8.4(a), and 8.4(c). Specifically, the Formal Complaint alleges violations of those rules on the bases that Respondent "challenged Attorney Paterra to a physical altercation," (Formal Complaint, ¶ 10(a)), and that "He grasped Attorney Paterra's tie, and pulled on it in a threatening and assaultive manner." (Id, ¶ 10(b).)

MRPC 6.5(a) provides:

> A lawyer shall treat with courtesy and respect all persons involved in the legal process. A lawyer shall take particular care to avoid treating such a person discourteously or disrespectfully because of the person's race, gender, or other protected personal characteristic. To the extent possible, a lawyer shall require subordinate lawyers and nonlawyer assistants to provide such courteous and respectful treatment.

MRPC 8.4 provides in relevant part:

> It is professional misconduct for a lawyer to:
>
> (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
>
> * * *
>
> (c) engage in conduct that is prejudicial to the administration of justice.

It is a sad commentary on the current state of the practice of law that there is a developing caselaw on assaults, abusive language, and other incivilities occurring in the course of depositions.

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[3]Our findings should not be taken as an endorsement of physical combat, but rather are simply our interpretation of what would have constituted a normal reflex or reaction if Mr. Paterra in fact had felt threatened. See Grievance Administrator v. Donald H. Stolberg, No. 95-72-GA; 95-107-FA (ADB 1996).

See, e.g., Attorney Discipline Board v. Fink, 96-181-JC (ADB 2001) (abusive language and physical struggle during deposition); Grievance Administrator v. Golden, 96-269-GA (ADB 1999) (physical struggle during deposition); Grievance Administrator v. Leonard B. Segel, 95-210-GA (ADB 1998) (abusive language and obstructive conduct during deposition). We recognize that Respondent believed that his opposing counsel had acted unethically, and we have noted some support for Respondent's contention.[4] However, as the Board noted in Leonard B. Segal, "[W]e have even greater reservations, which we have previously expressed, about the very notion that provocation excuses this kind of conduct. Grievance Administrator v. Donald H. Stolberg, No. 95-72-GA; 95-107-FA (ADB 1996) (disapproving of provocation as a 'justification,' but dismissing case on other grounds); Grievance Administrator v. Neil C. Szabo, No. 96-228-GA (ADB 1998) ('The answer to uncivil conduct is not escalation.')." Leonard B. Segal, 95-210-GA at 7. "[A] claim of provocation cannot automatically serve as a defense to, or excuse for, conduct such as this. Were we to hold otherwise we would be encouraging a downward spiral in the conduct of members of the bar." Id.

We recognize that the grievousness of Respondent's conduct in this case fell far short of that which was held improper in other cases. Of the charges in the formal complaint, we reject as not proven the allegation that Respondent "challenged Attorney Paterra to a physical altercation." (Formal Complaint, ¶ 10(a). The transcript of the deposition does twice reflect Respondent stating "let's go." (Petitioner's Exhibit 1, at 57.) The first statement appears to have been cut off, and likely would have been, as Respondent testified, a request to go off the record in attempt at conciliation. (McKeen: Hearing Tr. at 89.) The second statement is more ambiguous, and is followed by a more ominous sounding "You don't ever say that to me again ever," but again this falls short of a clear demonstration of intent to clash physically. Moreover, the most objective witness, court reporter Joanne Smith, did not perceive Respondent's conduct to be a threat or an invitation to fight. (Smith: Hearing Tr. at 20-21.)

The Formal Complaint also alleged that Respondent "grasped Attorney Paterra's tie, and pulled on it in a threatening and assaultive manner." (Formal Complaint, ¶ 10(b).) Respondent admits that he grasped Mr. Paterra's tie, and it is that act which forms the basis for our finding of misconduct. The most disputed fact in the entire hearing was what Respondent did with the tie after having grasped it. As noted above, we have concluded that Respondent certainly did not pull

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[4]Respondent seems to labor under the misconception that the nature of the case, and the fact that he represented an injured child, provides some sort of justification for, or explanation of, his conduct. See Petitioner's Exhibit 2 (Respondent's Response to Request for Investigation, dated June 25, 1999) at 1 ("This case concerns a baby girl who had been under the care of defendant Henry Ford Health System who the defendant failed to diagnose as suffering from nutritional Rickets. As a result of the defendant's negligence, the baby suffered a cardiopulmonary arrest and severe, permanent brain damage. As a result of her injuries, the little girl faces a life of hardship and disability."); id at 6 ("I do regret my unfortunate lack of discretion in touching Mr. Paterra's tie. I would, however, respectfully request that the Commission consider as a mitigating circumstance the pervasive and repetitive nature of Mr. Paterra's misconduct which was designed to prejudice an innocent little girl who suffered a permanent brain injury as the result of the negligent medical care.). Respondent's immediate statement by way of apology or explanation after grabbing Mr. Paterra's tie was "Listen, I'm representing an injured child. You're trying to coach him through – [.]" (Petitioner's Exhibit 1, at 58.) Needless to say, the Michigan Rules of Professional Conduct apply at all times, in all cases, with equal force; there is no sliding scale based on the (perceived) importance of the case or matter at hand. Moreover, to the extent that provocation is an issue, we note that it was Respondent, who, fairly early in the deposition, in response to an arguably improper objection, told opposing counsel to "Shut up." (Id at 19.) It also was Respondent who, in the colloquy leading up to the tie-grabbing incident, first stated to opposing counsel "You're a weasel." (Id at 57.) As we have noted, there was more than enough bad behavior on the part of both Respondent and Mr. Paterra to go around.

the tie "in a threatening or assaultive manner." (Id.) We conclude that Respondent either let the tie drop from his hand, or, at most, gave it a slight pull. This interpretation of events is based on what the court reporter observed (a single, slight pull on the tie). In fact, what the court reporter saw may well have been Respondent simply letting the tie drop from his hand, as he testified, which in the heat of the moment could have been confused with a slight tug. Nonetheless, even the slight, uninvited and unwelcome touching was a battery,[5] was certainly prejudicial to the administration of justice, MRPC 8.4(c), and certainly was discourteous to and disrespectful of someone involved in the legal process. MRPC 6.5(a).

Respondent made a number of arguments based on the ABA Standards for Imposing Lawyer Discipline. While it may be that Respondent's arguments have merit, the ABA Standards are applicable to the decision of what level of discipline to impose upon a finding of misconduct, not for the initial finding of whether Respondent committed misconduct. See Grievance Administrator v. Albert Lopatin, 462 Mich. 235, 238, 612 N.W. 2d 120, 123 (2000) (emphasis added) ("Today, we direct the ADB and hearing panels to follow the ABA Standards for Imposing Lawyer Sanctions *when determining the appropriate sanction for lawyer misconduct*."); ABA Standards for Imposing Lawyer Sanctions (1991 Ed.), § II (standards are for use by body "imposing sanctions."). The ABA Standards have no role in our threshold decision of whether or not misconduct occurred. See MCR 9.115(J)(1). For the reasons stated, we find that there was professional misconduct, and a hearing will be set to consider aggravating and mitigating factors. See MCR 9.115(J)(2). Respondent at that time will be free to make whatever argument he wishes based on the ABA Standards.[6]

ATTORNEY DISCIPLINE BOARD
Tri-County Hearing Panel #25

By: _____
Jonathan Tukel, Chairperson

[5] See W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 9 (5th ed. 1984) (Battery is an offensive contact with a person, resulting from an act intended to cause the person to suffer such a contact; id and n.8 ("if all other requisites of a battery against the plaintiff are satisfied, contact with the plaintiff's clothing" constitutes battery.); Michigan CJI 2d 17.1 ("A battery is . . . offensive touching of the person or something closely connected with the person of another.")

[6] Respondent argued that there was no ABA Standard applicable to the conduct charged in this case. (Hearing Tr. at 66-68.) We express no opinion on that question. We do note, however, that the ABA Standards are only a starting point for determining the discipline, if any, to impose. See Lopatin, 462 Mich. at 248 n.13, 612 N.W. 2d at 128 n.13 (the "directive to follow the ABA Standards is not an instruction to abdicate the[] responsibility to exercise independent judgment.") Thus, this panel must consider whether "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 precedent of this Court or the ADB," and if it so finds, must impose a different sanction and explain its reasons. Id. The panel notes one precedent of the ADB which may have relevance at the sanction hearing and which the parties should be prepared to argue: "Our decision to impose a suspension of 60 days - even though respondent has practiced with an unblemished record for over 37 years and this was an isolated incident which ended without physical injury to anyone – reflects our unwillingness to tolerate this type of behavior . . .lawyers can expect that conduct rising to the level of physical assault while performing their legal duties will generally result in suspension." Grievance Administrator v. Robert Golden, 96-269-GA (ADB 1999).

STATE OF MICHIGAN
ATTORNEY DISCIPLINE BOARD

GRIEVANCE ADMINISTRATOR,
Attorney Grievance Commission

[Entered: September 12, 2002]

Petitioner

v

Case No. 00-61-GA

BRIAN J. MCKEEN (P34123)

Respondent
_____/

REPORT ON SANCTIONS HEARING
BY TRI-COUNTY HEARING PANEL NO. 25

At a session of the Panel held at
211 West Fort Street, Ste. 1400, Detroit, Michigan

PRESENT: Jonathan Tukel, Chairperson
Francis P. Kuplicki, Member
Howard I. Wallach, Member

APPEARANCES: Ruth Ann Stevens, Esq., for Petitioner
Michael Alan Schwartz, Esq., for Respondent

WITNESSES: Jeremiah Kenney, for Respondent
Honorable Kaye Tertzag, for Respondent
David Patton, for Respondent

I. REVIEW OF MISCONDUCT

On April 10, 2000, the Attorney Grievance Commission charged Respondent, Brian J. McKeen, by a formal Complaint with violations of MRPC 6.5(a) (requiring lawyers to treat persons involved in the legal process with courtesy and respect), 8.4(a) (proscribing knowing violation of the Rules of Professional Conduct), and 8.4(c) (proscribing conduct that is prejudicial to the legal profession). A complete account of

the Respondent's conduct is set forth in this Panel's November 20, 2001 Report on Misconduct.

In sum, this Panel found that, after a heated verbal exchange between Respondent and opposing counsel during a deposition Respondent was conducting, Respondent got out of his chair, approached opposing counsel, grabbed opposing counsel's tie, let it drop, and went into the hallway with opposing counsel where he apologized for his behavior. Based on these facts, this Panel found that Respondent violated MRPC 6.5(a) and MRPC 8.4(c). Consequently, this Panel conducted a hearing on discipline pursuant to MCR 9.115(J)(2) on May 14, 2002 and now issues this Report on Sanctions.

II. REVIEW OF EXHIBITS AND TESTIMONY OF WITNESSES

At the sanctions hearing, the Grievance Administrator called no witnesses. The Grievance Administrator offered two exhibits. See Petitioner's Exhibits 5 (November 25, 1997 letter admonishing Respondent for not taking steps necessary to promptly evaluate a client's claim and notifying the client only 15 days prior to the expiration of the statute of limitations that Respondent would not handle the case) and 6 (September 27, 1999 letter admonishing Respondent for failing to adequately supervise a former associate and for failing to adequately communicate with a client). These were admitted into evidence without objection.

Respondent presented three witnesses. Jeremiah Kenney, a Michigan attorney since 1975, testified that he and Respondent have been frequent adversaries, squaring off in some 30 to 100 medical malpractice cases. Sanction Hearing Tr. at 8. Mr. Kenney indicated that he has never had a problem dealing with Respondent. Respondent's

demeanor, professionalism, and civility have always been appropriate. Mr. Kenney stated that he and Respondent have always been able to work out pre-trial disputes without court intervention. Sanction Hearing Tr. at 9. Mr. Kenney views Respondent as a tough negotiator, but said he never heard Respondent use profanity directed at another attorney or litigant and never observed Respondent lose his temper. Sanction Hearing Tr. at 12-13. Mr. Kenney said he would rate Respondent with the highest levels of competence and ethical behavior. Sanction Hearing Tr. at 10. Mr. Kenney stated that he has no personal relationship with Respondent. Sanction Hearing Tr. at 14.

The Honorable Kaye Tertzag, Wayne County Circuit Court Judge, also testified. He indicated that he first met Respondent at a Downriver Bar Association event many years ago. Sanction Hearing Tr. at 16. He was impressed with Respondent and has subsequently observed Respondent ten or more times in the courtroom at both motions and at trial. Sanction Hearing Tr. at 17. Judge Tertzag described Respondent's demeanor as always civil. Sanction Hearing Tr. at 10. He testified that Respondent has always conducted himself with the highest degree of professionalism. Sanction Hearing Tr. at 14.

David Patton, an attorney since 1969, also testified favorably regarding Respondent's character. He estimated ten to 15 cases in which he opposed Respondent. Sanction Hearing Tr. at 26. Mr. Patton described Respondent as always civil, never offensive or unprofessional albeit zealous in his representation. Sanction Hearing Tr. at 27. Mr. Patton testified that Respondent does not have a reputation as an uncivil or unprofessional attorney. Sanction Hearing Tr. at 32.

III. REPORT ON SANCTIONS

Pursuant to Grievance Administrator v Lopatin, 462 Mich 235, 238, 612 NW2d 120, 123 (2000), this Panel is required to follow the ABA Standards for Imposing Lawyer Sanctions. Lopatin requires this Panel to apply the following analysis:

> First, the following questions must be addressed: (1) What ethical duty did the lawyer violate? (A duty to a client, the public, the legal system or the profession?); (2) What was the lawyer's mental state? (Did the lawyer act intentionally, knowingly, or negligently?); and, (3) What was the extent of the actual or potential injury caused by the lawyer's conduct? (Was there a serious or potentially serious injury?).
>
> The second step of the process involves identification of the applicable standard(s) and examination of the recommended sanctions. Third, aggravating and mitigating factors are considered. Finally, "panels and the [Attorney Discipline] 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."

Grievance Administrator v Golden, 96-269-GA (ADB 2001), p 1 citing Lopatin, 462 Mich at 248 n 13, Grievance Administrator v Fink, 96-181-JC (ADB 2001), and Grievance Administrator v Musilli, 98-216-GA (ADB 2000). Answering these questions aids in the selection of the appropriate sanction recommended by the ABA Standards. Golden, supra at 2.

A. Duties Violated, Lawyer's Mental State, and Injury or Potential Injury

1. Duties Violated

Respondent's misconduct during the deposition violated duties he owed to the legal system and to the legal profession.

2. Respondent's Mental State

The ABA Standards define three levels of mental consciousness applicable to attorney misconduct. An "intentional" act is "the conscious objective or purpose to accomplish a particular result." A "knowing" act is "the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result." And, a "negligent" act is "the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation." See ABA Standards Definitions.

The record does not support a finding that Respondent's conduct was "intentional" as that term is defined under the ABA Standards. By getting out of his chair, approaching opposing counsel, and grabbing opposing counsel's tie in a non-threatening manner, it does not appear that Respondent intended to accomplish a particular result. At most, his intentions were unclear.

However, Respondent's conduct was "knowing". After getting out of his chair, approaching opposing counsel, and grasping opposing counsel's tie, Respondent immediately let go and apologized to opposing counsel in the hallway. This indicates a "conscious awareness of the nature or attendant circumstances of the conduct" consistent with the ABA Standards definition of "knowing". Moreover, even if not "knowing", Respondent's conduct was negligent. He failed to heed a "substantial risk" that adverse circumstances would follow his improper conduct. Respondent's failure was "a deviation from the standard of care that a reasonable lawyer would exercise in

the situation." Respondent demonstrated the requisite mental state to warrant discipline under the ABA Standards.

3. Injury or Potential Injury

In determining the "extent of the actual or potential injury caused by the lawyer's conduct", it is important to acknowledge that this is neither a criminal proceeding against Respondent nor a civil action between Respondent and opposing counsel. Respondent's misconduct violated duties he owed to the legal system and to the legal profession, not duties Respondent owed to the opposing counsel whose tie he grabbed in an individual capacity. Consequently, while it is important to consider the fact that the opposing counsel sustained no physical injury, this does not mean that Respondent's conduct caused no injury to the legal system or to the legal profession. On the contrary, by introducing to the deposition an unwelcome physical touching, albeit a non-threatening one, Respondent threatened injury to a key process by which adversaries gather information in civil litigation.

This was the subject of the Attorney Discipline Board's decision in Golden. In that case, the respondent grabbed opposing counsel during a deposition in order to recover an exhibit. Respondent briefly held opposing counsel in a headlock until counsel for a third party took possession of the exhibit. Respondent was suspended for 60 days as the result of his behavior – the Board finding that (in addition to concerns for the potential physical injury to the attorney assaulted) "interference with a legal proceeding is cognizable under the [ABA] Standards and constitutes misconduct". Golden, supra at 2.

As a result, the actual injury (interference with the deposition) or potential for injury (violence) in this instance was sufficient to warrant discipline under the ABA Standards.

B. Applicable ABA Standards

Having answered the preliminary questions as to warrant the imposition of a sanction, this Panel must identify the applicable ABA Standards for determining the appropriate sanction. The Grievance Administrator argues that Respondent's conduct violated ABA Standards 5.12 and 6.22. ABA Standard 5.12 provides:

> 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 conduct seriously adversely reflects on the lawyer's fitness to practice law.

While the Panel recognizes that legitimate arguments exist to support a finding that Respondent knowingly engaged in criminal conduct which does not contain the elements listed in ABA Standard 5.11, we decline to make a formal ruling on this factor because we find that the second factor of ABA Standard 5.12 has not been satisfied. Respondent's conduct does not "seriously adversely" reflect on the lawyer's fitness to practice law. Respondent's behavior did not rise to the level of the assaultive conduct in Golden or other recent cases involving deposition misconduct. See, e.g., Fink, supra (respondent shoved attorney deponent), Grievance Administrator v Lakin, 96-116-GA (ADB 1997) (respondent who struck opposing counsel and put forefinger into opposing counsel's forehead), and Grievance Administrator v Krupp, 94-178-GA (ADB 1995) (respondent who used profanity directed at opposing counsel, threw a pen at opposing counsel, and threatened physical violence). Accordingly, we turn to ABA Standard 6.22.

[DISCUSSION OF STANDARD 6.22 OMITTED
Pages 8-10 of HP Report on Sanctions]

[Page 10 continued]

As a result, we are left without clear direction from the ABA Standards to determine the appropriate discipline in this case. We turn, then, to consider aggravating and mitigating circumstances and precedent to determine what discipline is appropriate.

C. Aggravating and Mitigating Factors

At the hearing on discipline, the Grievance Administrator offered Petitioner's Exhibits 5 and 6 to prove prior instances of discipline involving Respondent. However, the nature of Respondent's prior misconduct is so different from the circumstances in this matter, that they do not constitute aggravating factors that "justify an increase in the degree of discipline to be imposed." ABA Standard 9.21.

Respondent presented three witnesses to vouch for Respondent's professionalism. This Panel finds all of the witnesses to be credible and helpful in demonstrating that Respondent's conduct under scrutiny in this instance was atypical behavior. Beyond this demonstration of Respondent's good character, Respondent offered no evidence of other mitigating circumstances in this instance.

D. Appropriate Level of Discipline

As indicated above, while ABA Standard 6.22 speaks of suspension for a knowing interference with a legal process, our analysis indicates that ABA Standard 6.22 is not helpful in determining the appropriate discipline in this case. It is clear to the **[Page 11]** Panel, however, that the facts of this case do not warrant suspension. Accord Wallach dissent (attached).

But, as set forth in the ABA Standards:

> [T]he Standards are not designed to propose a specific sanction for each of the myriad of fact patterns of cases of lawyer misconduct. Rather, the Standards provide a theoretical framework to guide the courts in imposing sanctions. The ultimate sanction imposed will depend upon the presence of any aggravating or mitigating factors in a particular situation. The Standards thus are not analogous to criminal determinate sentences, but are guidelines which give courts the flexibility to select an appropriate sanction in each particular case of lawyer misconduct.

See ABA Standards, p 6. Moreover, "[I]n the rare case where the mitigating factors clearly outweigh the aggravating factors as well as the nature and harm of the misconduct, an order of no discipline may still be appropriate." Grievance Administrator v Bowman, 462 Mich 582, 589, 612 NW2d 820, 823 (2000) (citation omitted). "We endorse the following statement made by the ADB: 'The fact that a "no discipline" option exists does not mean that it should be employed often. The option should be exercised quite sparingly by panels and the Board.'" Id., n 14.

Acknowledging that the facts of this case are not as egregious as other instances of assaultive behavior during depositions, the Grievance Administrator asked that Respondent be reprimanded. See Sanction Hearing Tr. at 46. Respondent requested that no discipline be imposed. This Panel believes the Grievance Administrator's recommendation is sound.

As suggested above, and acknowledged by the Grievance Administrator, the severity of the conduct under scrutiny here is less than the conduct sanctioned in **[Page 12]** Golden. It is appropriate, therefore, that the discipline imposed be less. The 60 day suspension upheld in Golden would not be appropriate in this case. But some form of discipline is necessary. This is not one of those "rare cases," Bowman, 462

Mich at 589, 612 NW2d at 823, where a finding of no discipline is appropriate. While the conduct is not as severe as in other cases, neither are there mitigating factors which "clearly outweigh the aggravating factors as well as the nature and harm of the misconduct." Id.

As stated in Golden:

> Our decision to impose a suspension of 60 days – even though respondent has practiced with an unblemished record for over 37 years and this was an isolated incident which ended without physical injury to anyone – reflects our unwillingness to tolerate this type of behavior. We will continue to review and decide these matters on a case-by-case basis, as is the rule in attorney discipline proceedings. However, we will not forget that persons involved in the legal process are engaged in an undertaking vital to our society.
>
> When a client counsels with an attorney or when a person participates in some phase of litigation, the greater end involves – and should strengthen – the rule of law. We cannot ask all citizens to conduct their legal affairs and the pursuit of justice in accordance with a process which the lawyers themselves abandon when it becomes inconvenient. For these reasons 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. However, we hereby serve notice on the profession that its members should, before acting, reflect on the fact that these cases will be taken seriously by this Board.

[Page 13] Golden, supra, p 2-3. While the severity of Respondent's conduct obviously is less than that of the respondent in Golden, the same concerns apply. This Panel

believes there can be no tolerance of unwelcome touching that could lead to violence in the legal process.

Consequently, considering precedent and the circumstances of this case, this Panel concludes that Respondent should be reprimanded. A reprimand appropriately balances this Panel's factual findings with its concern for maintaining professionalism within the Bar. A reprimand endorses the notice the Attorney Discipline Board intended to send in Golden yet does not vilify a capable attorney whose record, based on the evidence before this Panel, is otherwise good. A reprimand will force Respondent to give pause regarding his behavior, but not threaten his livelihood.

IV. CONCLUSION

Respondent engaged in professional misconduct. His discourteous conduct reflects poorly on the profession and cannot be ignored. By his unwelcome touching during a deposition, a technical assault, Respondent introduced an element of physicality that has no place in the legal process. While a reprimand is a minimal level of discipline, it is an appropriate sanction given the facts of this case.

ATTORNEY DISCIPLINE BOARD
Tri-County Hearing Panel #25

By:_____
Jonathan Tukel, Chairperson

By:_____
Francis P. Kuplicki, Member

STATE OF MICHIGAN

ATTORNEY DISCIPLINE BOARD

GRIEVANCE ADMINISTRATOR, [Entered: September 12, 2002]
Attorney Grievance Commission,

Petitioner,

v Case No. 00-61-GA

BRIAN J. MCKEEN (P34123)

Respondent.
_____/

Dissent by Howard I. Wallach, Member.

I. REVIEW OF MISCONDUCT

I respectfully dissent. On April 10, 2000, Respondent, Brian J. McKeen, was charged by formal Complaint with violations of MRPC 6.5(a), 8.4(a) and 8.4(c). On November 20, 2001, this Panel issued a Report on Misconduct (ROM). We rejected as not proven the allegation that Respondent "challenged Attorney Paterra to a physical altercation." This Panel did, however, find misconduct in the Respondent's "touching" (not grabbing as the majority now states[1]) of Attorney Paterra's tie, although we did not believe that he pulled on it "in a threatening or assaultive manner." Accordingly, Respondent's conduct was found to be in violation of MRPC 6.5(a), being discourteous to or disrespectful to someone involved in the legal process and MRPC 8.4(c), prejudicial to the administration of justice. Consequently, a sanctions hearing was scheduled pursuant to MCR 9.115(J)(2).

[1] See, Report on Misconduct, p 4.

It is undisputed that the basic goal of our disciplinary system is to protect "the public, the courts, and the legal profession". MCR 9.105. Pursuant to *Grievance Administrator v Lopatin*, 462 Mich 235, 238; 612 NW2d 120 (2000), this Panel is required to follow the ABA Standards for Imposing Lawyer Sanctions when determining the appropriate sanction for lawyer misconduct. In *Grievance Administrator v Musilli*, 98-216-GA (ADB 2000), the Attorney Discipline Board (ADB) applied the ABA Standards utilizing the theoretical framework adopted in *Lopatin* restated as follows:

> First, the following questions must be addressed: (1) What ethical duty did the lawyer violate? (A duty to a client, the public, the legal system or the profession?); (2) What was the lawyer's mental state? (Did the lawyer act intentionally, knowingly, or negligently?); and, (3) What was the extent of the actual or potential injury caused by the lawyer's conduct? (Was there a serious or potentially serious injury?).
>
> The second step of the process involves identification of the applicable standard(s) and examination of the recommended sanctions. Third, aggravating and mitigating factors are considered. Finally, "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.

However, the *Lopatin* Court cautioned the ADB and hearing panel's not to abdicate the duty to exercise independent judgment and apply existing precedent, rather than blindly follow the ABA Standards stating:

> 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.

Accordingly, we must not only apply the theoretical framework established by the ABA Standards and adopted in *Lopatin*, but we must apply precedent from our Supreme Court and the ADB in determining an appropriate sanction in this case.

II. REVIEW OF EXHIBITS AND TESTIMONY OF WITNESSES

The Grievance Administrator called no witnesses at the sanctions hearing. Two (2) Exhibits were, however, admitted into evidence without objection. Petitioner's Exhibit 5 is a letter of admonishment issued to Respondent on November 25, 1997. In that case Respondent was admonished for not taking steps necessary to promptly evaluate a client's claim and giving the client only fifteen (15) days prior to the expiration of the statute of limitations to seek new counsel when he declined to handle the matter. Petitioner's Exhibit 6 is a letter of admonishment issued to Respondent on September 27, 1999. In that case the Respondent was admonished for failing to adequately supervise a former associate and communicate with his client.

The Respondent offered three (3) witnesses who testified regarding their personal experiences with him either as opposing counsel or as a Judge before whom Respondent has appeared. The first witness was Jeremiah Kenney. Mr. Kenney has been an attorney since 1975. He has no personal relationship with the Respondent, but has been his adversary on between thirty (30) and one hundred (100) medical malpractice cases. He has never had a problem dealing with the Respondent in terms

of his demeanor, professionalism, or civility. In all of the cases they have handled together, Mr. Kenney does not remember ever having to appear in court on a contested motion prior to a case going to trial, as Mr. Kenney and the Respondent were always able to work out whatever disagreements or disputes they had regarding pretrial matters. Although Mr. Kenney views the Respondent as a tough negotiator, he has never heard him lose his temper or use profanity directed at an attorney or litigant. He described the Respondent as being a zealous advocate for his clients and one whom, if he were ever asked, would rate with the highest levels of competence and ethical behavior in Martindale-Hubbell. Tr, pp7-14.

The second witness to testify was the Honorable Kaye Tertzag. Judge Tertzag was admitted to the bar in 1969. He has been a Wayne County Circuit Court Judge for the past sixteen (16) years. He met Mr. McKeen when Respondent spoke at a Downriver Bar Association function many years ago. He has observed Respondent ten (10) or more times in his courtroom appearing on motions and at trial. He described Respondent's demeanor as always being civil and with the highest degree of professionalism. Judge Tertzag was impressed with Respondent's passion for legitimately injured clients and his zealous advocacy on behalf of those clients. When asked if he has ever observed the type of behavior by Respondent which occurred in this case, Judge Terzag testified that such behavior would be totally out of character for the Respondent based upon his personal observations. Tr, pp15-23.

The last witness to testify was attorney David Patton. He has been an attorney since 1969. He was formerly a special agent with the Federal Bureau of Investigation, has worked for two (2) law firms, and since 1988 has had his own law firm where he

does both plaintiff and defense litigation. Mr. Patton has been the Respondent's adversary between ten (10) and fifteen (15) times. He described Respondent's demeanor as always civil, never offensive or unprofessional and always zealous in his representation of his clients. On several occasions he has witnessed defense lawyers trying to bait the Respondent with inappropriate behavior, but Respondent has never taken the bait. When asked by two of the Panel members whether there is a "book" on the Respondent among members of the defense bar which suggests that if you push Respondent's buttons appropriately you can get him angry to the point of distracting him or engaging him in unprofessional or uncivil behavior, Mr. Patton denied ever hearing of Respondent having such a reputation. While Mr. Patton agreed that the conduct engaged in by the Respondent in this case was certainly inappropriate, he has never seen the Respondent be uncivil or unprofessional in any manner, win or lose, in any of the many cases they have had with each other. Tr, pp 24-36.

III. REPORT ON SANCTIONS

A. Duties Violated, Lawyer's Mental State & Injury or Potential Injury

1. Duty or Duties Violated

Respondent's misconduct is a violation of the duty owed to the legal system. ABA Standards 6.0.

2. Respondent's Mental State

The ABA Standards define three levels of mental consciousness applicable to alleged misconduct. First, an intentional act "is the conscious objective or purpose to accomplish a particular result." Second, a knowing act "is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious

objective or purpose to accomplish a particular result." Third, a negligent act "is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation." ABA Standards Definitions. While volitional, Respondent's conduct here was not intentional because he was not acting in a manner to accomplish a particular result. On the contrary, Respondent's conduct was the product of a momentary lapse in judgment or control. He testified as to his extreme frustration due to the repeated coaching of witnesses later found to be improper by Judge Borman. Therefore, his conduct was not "knowing" as defined by the ABA Standards. Accordingly, I find Respondent's mental state to have been negligent because he failed to "heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation."

3. <u>Extent of Actual or Potential Injury</u>

Even though Attorney Paterra was not "a client or a party" and therefore would not be covered by ABA Standard 6.22 were we to apply its terms literally, there is no credible evidence of injury, as defined in the ABA Standards, to Attorney Pattera. I also find that the touching of Attorney Paterra's tie did not rise to the level of a potential injury, as defined in the ABA Standards, because we found "Respondent touched the tie a single time, not more than halfway up, did not pull or jerk it violently, and released it." While inappropriate, this conduct does not amount to "harm to a client, the public, the legal system or the profession that is reasonably foreseeable at the time of the lawyer's misconduct, and which, but for some intervening factor or event, would probably have

resulted from the lawyer's misconduct." ABA Standards Definitions. This was a momentary lapse in judgment that was over so quickly Attorney Paterra testified he never moved in his chair, stood up or took any defensive position. There was no intervening factor or event. Respondent simply realized what he was doing was wrong and stopped immediately.

B. Applicable ABA Standards

In this case the Grievance Administrator argues the Respondent's conduct violated ABA Standards 5.12 and 6.22. Standard 5.12 reads as follows:

> 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 conduct seriously adversely reflects on the lawyer's fitness to practice law.

Standard 5.12 is written in the conjunctive. Accordingly, two factors must be present for a violation of this Standard to have occurred. First, the lawyer must have knowingly engaged in criminal conduct which does not contain the elements listed in Standard 5.11. While I agree with the majority that legitimate arguments exist to support a finding that this factor of the Standard has been satisfied, I likewise decline to make a formal ruling on this factor because I find that the second factor of this Standard has not been satisfied, i.e. the conduct must "seriously adversely" reflect on the lawyer's fitness to practice. See, *Grievance Administrator v Fink*, 96-181-JC, p 6-7(ADB 2001). Accordingly, I now turn to a review of Standard 6.22. That Standard reads as follows:

> 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.

This Standard has two components. First, the lawyer must know that he or she is violating a court order or rule. Second, the violation must either cause injury or potential injury to a client or a party, or cause interference or potential interference with a legal proceeding. There has been no argument made, nor evidence produced, that any court order was violated. Accordingly, for this Standard to apply under the facts in this case, we must be satisfied that Respondent's conduct violated a rule and that it caused interference or potential interference with a legal proceeding since we have already rejected the claim of injury to Attorney Pattera. I cannot come to such a conclusion. As we noted in our ROM, "Although the conduct engaged in by all counsel may well have been below that which is required by Michigan attorneys, the sole question before us is whether Mr. McKeen engaged in unprofessional conduct". ROM, p 2. While it is unfortunate that each of the lawyers in this case engaged in behavior that was inappropriate[2], interruptions, adjournments and continuations of depositions occur on a daily basis for a multitude of reasons. Here, Respondent was taking the deposition of a key defendant doctor and his misconduct resulted in the deposition being suspended. The suspension inured to the benefit of Attorney Paterra's client, the deponent, since it gave Attorney Pattera more time to prepare his client for the balance of the deposition. That, of course, does not justify or excuse the misconduct committed by the Respondent. However, the misconduct certainly did not rise to the level of

[2] The record before us includes a transcript of a hearing before Wayne County Circuit Court Judge Susan Borman following the deposition incident that gave rise to this case. In that hearing, Judge Borman found that Attorney Paterra's conduct in coaching witnesses was inappropriate. Respondent's Exhibit 3, pp 4-7. In my opinion such conduct is also a violation of the Rules of Professional Conduct and may even amount to inciting one to commit perjury (MCL § 750.425) and an attempt to obstruct justice. See, MRPC 3.4(a), (b) and 8.4(c) and MCL § 750.505. When asked what sanction would be appropriate for an attorney who engaged in the misconduct committed by Attorney Paterra, counsel for the Grievance Administrator indicated she was not aware of any case where an attorney had been formally charged with misconduct based upon such facts and, therefore, she would need to review the Standards before responding. Tr, p 48.

causing "interference" with the proper administration of justice as our Supreme Court has interpreted that term in the past. See, *Grievance Administrator v Fried*, 456 Mich 234, 570 NW2d 262 (1997).

Similarly, the misconduct did not cause "interference or potential interference with a legal proceeding" to the extent that it obstructed the matter from proceeding to a conclusion in a reasonable time based upon the schedule established by the court. Compare, *In re Conduct of Wyllie*, 326 Or 447; 952 P2d 550 (1998) where an attorney was suspended for one year after appearing in court intoxicated several times resulting in at least two of the cases being delayed; *In re Vincenti*, 92 NJ 591; 458 A2d 1268 (1983) where an attorney was suspended for making repeated discourteous, insulting and degrading verbal attacks on the judge and his rulings which substantially interfered with the orderly trial of a case; and *Florida Bar v Rosenberg*, 387 So 2d 935 (Fla 1980) where an attorney was reprimanded for harassing delaying tactics which interfered with the trial of a case.

Here, there is no evidence that even minimally suggests that the brief incident that occurred in this case and caused the temporary suspension of the deposition in any way interfered with the underlying case proceeding to its conclusion in a timely fashion. In fact, the opposite is true. Respondent's Sanction Phase Memorandum informed the Panel that the underlying case was tried before a Wayne County Circuit Court jury in late 2001.

C. <u>Aggravating and Mitigating Factors</u>

Having thoroughly reviewed each of the Exhibits offered by the Grievance Administrator, I likewise find that the nature of the misconduct in each of those cases is

so distinctly different from the nature of the misconduct in this case that they do not constitute aggravating factors that "justify an increase in the degree of discipline to be imposed." ABA Standard 9.21.

D. Appropriate Level of Discipline

As the ABA Standards note,

> [T]he Standards are not designed to propose a specific sanction for each of the myriad of fact patterns of cases of lawyer misconduct. Rather, the Standards provide a theoretical framework to guide the courts in imposing sanctions. The ultimate sanction imposed will depend upon the presence of any aggravating or mitigating factors in that particular situation. The Standards thus are not analogues to criminal determinate sentences, but are guidelines which give courts the flexibility to select an appropriate sanction in each particular case of lawyer misconduct. See, ABA Standards, p 6.

In this case, the Grievance Administrator argues that Respondent's misconduct warrants a reprimand. The Respondent argues no discipline is needed or appropriate. In *Grievance Administrator v Deutch*, 455 Mich 149; 565 NW2d 369 (1997), the Supreme Court held that "hearing panels do have the discretion to issue orders of discipline appropriate to the specific factors of a case, including orders that effectively impose no discipline". *Id* at 169. In *Deutch*, each of the respondents was convicted of drunk driving. The Court found that hearing panels do not have the authority to dismiss a case at the first stage of the disciplinary process when the Grievance Administrator has filed a judgment of conviction. However, the Court expressly noted that

> MCR 9.106 echoes the language in MCR 9.104, which states that a finding of "misconduct" is only "*grounds* for discipline," not that a finding of misconduct requires the imposition of discipline in every case. Where notions of justice and fairness require, we hold that the order of discipline required under MCR 9.115(J)(1) and (3), could

> include an order that effectively imposes no discipline on an attorney. 455 Mich at 163.

The Court went on to note, "Finally in the rare case where the mitigating circumstances clearly outweigh any aggravating factors and the nature and harm of the crime, the Panel may decide to forgo the imposition of discipline at all." 455 Mich at 163, n 13.

Moreover, the Commentary to MRPC 8.4 makes it clear that not all transgressions by an attorney warrant disciplinary sanctions.

> Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. *However, some kinds of offenses carry no such implications.* Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses that have no specific connection to the fitness to practice law. Although a lawyer is personally answerable to the entire criminal law, *a lawyer should be professionally answerable only for those offenses that indicate lack of those characteristics relevant to law practice.* Offenses involving *violence*, dishonesty, breach of trust, or *serious interference* with the administration of justice are in that category. (Emphasis supplied.)

Consequently, if Respondent had been found to have engaged in a criminal offense not involving violence or any other aggravating factors, the Commentary makes clear that no discipline would be imposed. This is consistent with *Deutch*, *supra.* Therefore, it is appropriate for us to now consider precedent as we were directed in *Lopatin*.

In recognition of the increased lack of civility and repeated instances of physical confrontation among lawyers, this Panel directed the parties to be prepared to discuss

the implications of *Grievance Administrator v Golden*, 96-269-GA (ADB 1999). ROM, p 7, n 6. In that case, as in the case before this Panel, an attorney engaged in misconduct at a deposition. The respondent there assaulted his opposing counsel in an attempt to recover documents produced by a deponent to prevent them from being marked as an exhibit. The hearing panel's finding of misconduct was affirmed by the ADB, but the 180-day suspension was reduced to 60 days. Finding that respondent had an unblemished record for over 37 years and that the incident at the deposition was an isolated one, which ended without physical injury to anyone, the ADB felt a reduction in the discipline was appropriate. The ADB went on, however, to note that while lawyers "can expect that conduct rising to the level of a physical assault" will generally result in a suspension, it does not "mean that a suspension will be warranted whenever an attorney touches another person involved in the legal process." *Golden, surpa* at p 5.

The facts in *Golden* are distinctly different from those in this case. In *Golden* the respondent violently grabbed his opposing counsel and put him in a headlock. Here we found that "Respondent touched [Attorney Paterra's] tie a single time, not more than halfway up, did not pull or jerk it violently, and released it." We further found that Respondent did not pull the tie in a "threatening or assaultive manner." ROM, p 6. Respondent *Golden's* behavior was so aggressive that it crossed the threshold and "seriously adversely" reflected on his fitness to practice. There was no evidence of such aggressiveness in this case. In fact, within moments of the incident, Respondent and Attorney Paterra walked together to a hallway where Respondent apologized.

In *Fink*, *supra*, the respondent ran around a conference table and attacked opposing counsel causing him to fall to the ground. The ADB reprimanded Mr. Fink who was convicted of a misdemeanor assault for fighting with opposing counsel during a deposition. In that case, the ADB was asked to consider whether the respondent's conduct violated Standard 5.12 and rejected the request stating "this particular shoving incident does not 'seriously adversely reflect' this particular respondent's fitness to practice." *Id* at p 8. So too, here. The specific incident which resulted in the charges against the Respondent do not reflect a lack of fitness to practice law because it was so minor, abbreviated, was not directed at clients, did not produce injury and was the product of a momentary loss of control as a result of what a Wayne County Circuit Court Judge found to be inappropriate conduct on behalf of Attorney Paterra. Furthermore, the record fails to indicate any similar conduct by Respondent throughout his otherwise distinguished career. Nothing approaching the violent severity of the attack in *Fink* occurred in this case. As the ADB noted in *Fink*,

> Any rule which would simplistically characterize conduct by labels (e.g. "assault"), and then allow that characterization to dictate the level of discipline to be imposed irrespective of factual distinctions, will promote barren records and decisions on discipline without all relevant facts. This is ultimately harmful to the public, the courts, and the bar. For only when a panel, this Board and/or the Court have a full and true picture of the nature of the misconduct can the appropriate level of discipline be assigned. *Fink, supra* at p 13.

This Panel had the opportunity to hear the testimony, observe the witnesses and place the facts in complete context. After having done so, our ROM found that Attorney Paterra's testimony regarding the incident "simply was not credible as to what took place (as well as a number of other points)." ROM, p 4. In fact, this Panel did not believe

there was any real violence or threat associated with the momentary touching of Attorney Paterra's tie.

I am cognizant of the decisions in *Grievance Administrator v Lakin*, 96 116 GA (ADB 1997) and *Grievance Administrator v Krupp*, 94-178-GA (ADB 1995). Both of those cases are distinguishable, however, because of the nature and extent of the violent physical acts involved. In *Lakin*, the respondent struck opposing counsel causing his glasses to fall to the floor and then later exacerbated the incident by pushing his forefinger into opposing counsels' forehead. In *Krupp*, the respondent used profanity directed at opposing counsel, threw a pen at him while swearing at him and threatened him with physical violence saying that he would "kick [his] ass". In those cases a reprimand was deemed appropriate.

Similarly, in *Grievance Administrator v Thick*, DP-147/83 (ADB 1984), the respondent pled guilty to a misdemeanor assault after having taken a pistol from his desk drawer and brandishing it during an argument which took place between a divorcing couple. When the husband attempted to leave the respondent's office with some documents, the respondent blocked the husband's way out of the office and a fight ensued that resulted in the respondent and the husband rolling down a flight of stairs. The respondent was reprimanded.

In *Grievance Administrator v Novek*, 91-135-GA (ADB, 1992), a reprimand was deemed appropriate when the respondent engaged in rude, condescending and discourteous behavior towards a witness during a deposition. The witness then physically pushed the respondent during a break in the deposition. Nothing even approaching such behavior occurred in this case.

IV. CONCLUSION

Our ROM clearly evidences the Panel's conclusion that Respondent engaged in professional misconduct. Our task at this point is to assess what sanction, if any, is appropriate. The Grievance Administrator has requested that we impose a reprimand and relies upon *Grievance Administrator v Eston*, DP 48/45 (ADB 1987) and *Musilli*, *supra*. Each of those cases is distinguishable, *Eston* because of the threats and intimidation involved and *Musilli* because it had nothing to do with violence. The Respondent suggests that no discipline is warranted. Having had an opportunity to listen to the witnesses, fully sift through the facts and probe the witnesses where members of this Panel felt it necessary, we concluded that Attorney Paterra's testimony concerning what transpired was not completely credible. To his credit, the Respondent acknowledged what he did, described it much more accurately than Attorney Paterra, and he apologized to Attorney Paterra within moments of the incident.

Considering the precedent we are required to follow, as well as applying the ABA Standards and "notions of justice and fairness", *Deutch* at 163, I conclude that the Respondent's one-time touching of Attorney Paterra's tie without pulling or jerking it violently, and then releasing it, does not come anywhere close to the conduct found to warrant a reprimand in *Golden, Fink, Lakin, Krupp, Thick* and *Novek*. Accordingly, while I in no way approve of Respondent's conduct and agree with the admonition in *Golden* that "lawyers can expect that conduct rising to the level of a physical assault while performing their legal duties will generally result in a suspension", *Golden* clearly indicates that a suspension will not be warranted "whenever an attorney touches another person involved in the legal process." *Golden, supra* p 5.

Applying the common sense principles of "progressive discipline, proportionality, and careful inquiry into the facts", *Fink, supra* at 19, and the applicable mitigating factors in ABA Standard 9.32, e.g. no dishonest or selfish motive, timely good faith effort to rectify the consequences of the misconduct, full and free disclosure to the Grievance Commission and a cooperative attitude toward the proceedings, a reputation for always behaving in a civil and professional manner sometimes even in the face of being bated by opposing counsel, a sincere sense of remorse, no prior similar acts of misconduct and the lack of any violence in this case, I conclude this is one of those rare cases where no discipline is necessary to "protect the public, the court or the profession." MCR 9.105. Accordingly, I dissent from the decision to reprimand the Respondent.

ATTORNEY DISCIPLINE BOARD
Tri-County Hearing Panel #25

By:_____
Howard I. Wallach, Member

STATE OF MICHIGAN

Attorney Discipline Board

GRIEVANCE ADMINISTRATOR,
Attorney Grievance Commission,

Petitioner,

v

BRIAN J. MCKEEN, P-34123,

Respondent.
_____/

[Entered: November 20, 2001]

Case No. 00-61-GA

REPORT ON MISCONDUCT BY TRI-COUNTY HEARING PANEL #25

At a session of the panel held at 719 Griswold, Ste. 1910, Detroit, Michigan, on July 20, 2001.

PRESENT: Jonathan Tukel, Chairperson
Francis P. Kuplicki, Member
Howard I. Wallach, Member

APPEARANCES: Ruth Ann Stevens, Esq.,
for the Petitioner

Michael Alan Schwartz, Esq.,
for the Respondent.

I. PLEADINGS

Date Filed	Description
04/10/00	Formal Complaint, Discovery Demand
04/11/00	Notice of Hearing, Initial Instruction Sheet
04/12/00	Proof of Service
05/22/00	Notice of Administrative Adjournment Without Date
08/23/00	Default, Affidavit, Proof of Service
08/23/00	Formal Complaint - FA
08/25/00	Stipulation to Set Aside Default (no Proof of Service)
08/25/00	Respondent's Answer to Formal Complaint, Discovery Demand, Discovery Response (no Proof of Service)
09/06/00	Petitioner's Response to Respondent's Discovery Demand, Proof of Service

09/29/00	Petitioner's Motion to Disqualify Hearing Panel Member Gurwin, Proof of Service
11/07/00	Notice of Substitution of Panelist
01/24/01	Notice of Substitution of Panelist
04/04/01	Notice of Hearing
04/16/01	Proof of Service
04/24/01	Notice of Adjournment with New Date

II. EXHIBITS

Number	**Description**
Petitioner's Exhibit 1	Deposition of Dr. Jasvinder S. Dhillon
Petitioner's Exhibit 2	Letter dated June 25, 1999
Respondent's Exhibit 3	Transcript of Protective Order Motion
Petitioner's Exhibit 4	Deposition of Dr. Annamaria Church

III. WITNESSES

1. Joanne Smith;
2. Carmine Paterra; and
3. Brian McKeen, Respondent;

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Attorney Brian J. McKeen ("McKeen" or "Respondent") was charged by formal complaint with having violated Michigan Rules of Professional Conduct 6.5(a) (discourteous conduct), 8.4(a) (violation of a professional rule), and 8.4(c) (engaging in conduct prejudicial to the administration of justice). The allegations centered around the unfortunate conduct engaged in by McKeen and his opposing counsel during a deposition on May 5, 1999.[1] Although the conduct engaged in by all counsel may well have been below that which is required of Michigan attorneys, the sole question before us is whether Mr. McKeen engaged in unprofessional conduct. Finding that he did, we will enter a finding of misconduct, and direct the clerk to schedule a sanctions hearing. MCR 9.115(J)(2).

This case arises from a medical malpractice action. Respondent McKeen represented the plaintiff; Complainant Carmine Paterra was one of the attorneys representing one of the defendants. A series of depositions were taken in the case. The Dhillon deposition was conducted after other depositions already had been taken. Earlier depositions had led to hard feelings

[1]The deposition was of Jasvinder S. Dhillon, M.D., in Hall v. Cottage Hospital, Wayne County Civil No. 98-819843-NH, and is referred to hereafter as "the Dhillon deposition". A transcript of the Dhillon deposition was introduced at the hearing as Petitioner's Exhibit 1.

between the attorneys, as Respondent McKeen believed that at an earlier deposition, Mr. Paterra had improperly attempted to suggest answers to the deponent. (McKeen: Hearing Tr. at 80-82.)

Present at the Dhillon deposition were Respondent McKeen, who represented the plaintiff; Complainant Paterra, who represented one of the defendants; Attorney Bennie L. Grier, who represented the other defendant; and Joanne Smith, the court reporter who transcribed the deposition.

It was McKeen's opinion that, during the course of the Dhillon deposition, Attorney Paterra again engaged in improper witness coaching. (Id at 82-83.) To the extent that it is important to the resolution of this case, the evidence in fact supports McKeen's belief. See, e.g., Petitioner's Exhibit 1, at 8, 16 and 19.

Tension grew throughout the deposition, finally culminating in the following exchange:[2]

MR. PATERRA: Hang on. He just answered that question. You twist and turn and misphrase things throughout this deposition. He said the resident has flexibility as to the plan. Now you're saying the resident –

MR. McKEEN: You don't say a word except objection. This is completely inappropriate.

MR. PATERRA: Bring it in front of the Court.

MR. McKEEN: I will.

MR. PATERRA: I don't appreciate it.

MR. McKEEN: You're a weasel.

MR. PATERRA: You're a bigger weasel.

MR. McKEEN: All right. Let's go.

MR. PATERRA: Sit down.

MR. McKEEN: No, let's go. You don't ever say that to me again ever.

MR. PATERRA: Well, don't say it to me.

MR. McKEEN: Ever. I will say to you –

MR. PATERRA: Let the record reflect that plaintiff [sic] has grabbed my tie around my throat and I will bring a motion for protective order that he no longer presents at any more depositions.

MR. McKEEN: Well, well, well.

[2]The quotation is taken verbatim from the transcript of the Dhillon deposition, Petitioner's Exhibit 1.

MR. PATERRA: You have a lot more coming than you think you do and if this continues, this deposition is going to stop right now.

MR. McKEEN: Listen, I'm representing an injured child. You're trying to coach him through –

MR. PATERRA: This deposition is over. That's bullshit.

MR. McKEEN: This is bullshit.

MR. PATERRA: That's bullshit. Don't you ever touch me again. This deposition is over. Got that? No more questions. Do not answer another question. Bring it –

MR. McKEEN: I didn't touch you.

MR. PATERRA: We have four witnesses here. Bring it in front – in fact, I'm going to bring it in front of the judge.

You're not going to answer any more discussions. You're not going to have any discussions with plaintiff's counsel.

MR. McKEEN: Can I just talk to you for a minute?

MR. PATERRA: No. No way. It' bullshit, Brian.

MR. McKEEN: Let's go off the record a minute.

(Petitioner's Exhibit 1, at 57-59.)

At the hearing, the parties hotly contested the issue of exactly what *physical* contact occurred during the deposition between Respondent McKeen and Complainant Paterra. Respondent admitted that he stood up and wrapped his hand around the middle of Mr. Paterra's tie. Respondent denied having pulled or tugged on the tie, testifying that, after having grasped the tie, he let it drop. Respondent also testified that he regretted his actions as soon as they occurred. (McKeen: Hearing Tr. at 85-86.) Attorney Paterra, by contrast, testified and physically demonstrated that Respondent grabbed the tie just below the knot, close to Paterra's throat, and twice jerked the tie above Paterra's head in violent motions. (Paterra: Hearing Tr. at 25, 37.) The court reporter, Joanne Smith, testified that Respondent held the tie toward the middle, and gave one slight, downward pull on it, in a non-violent manner. (Smith: Hearing Tr. at 19-20.)

Having heard the evidence and having considered the demeanor of the witnesses, the panel finds that Respondent touched the tie a single time, not more than halfway up, did not pull or jerk it violently, and then released it. This conclusion is bolstered by several facts. The testimony of the court reporter belies any claim that Respondent pulled the tie upward, or that he tugged on it twice. Moreover, Mr. Paterra's testimony, beyond the type or number of tugs, simply was not credible as to what took place (as well as a number of other points). Mr. Paterra testified that he was very frightened by Respondent's conduct. However, according to Mr. Paterra, he never stood

or pushed his own chair away. (Paterra: Hearing Tr. at 58.).[3] The panel simply cannot credit Mr. Paterra's testimony as to the violent tugging of the tie in light of the other evidence, as well as his undisputed testimony as to his own actions.

Immediately following the incident, both attorneys met together in the hallway, together with Attorney Grier. That conversation was not transcribed. Both Respondent McKeen and Complainant Paterra testified at the hearing regarding the conversation, however. Based upon the testimony at the hearing, the panel finds that during that conversation, Respondent apologized for his actions and attempted to find a way to resume the deposition. Nonetheless, the deposition did not resume that day. Subsequently, Mr. Paterra filed a motion for a protective order with the Circuit Court. The Circuit Court denied the motion, but as a result of the Court's suggestion made during the hearing on the motion, at least one subsequent deposition was taken in the courthouse. Other depositions since the incident have been taken at the attorneys' offices. The litigation is ongoing.

V. HEARING PANEL REPORT ON MISCONDUCT

Respondent is charged by formal complaint with violations of MRPC 6.5(a), 8.4(a), and 8.4(c). Specifically, the Formal Complaint alleges violations of those rules on the bases that Respondent "challenged Attorney Paterra to a physical altercation," (Formal Complaint, ¶ 10(a)), and that "He grasped Attorney Paterra's tie, and pulled on it in a threatening and assaultive manner." (Id, ¶ 10(b).)

MRPC 6.5(a) provides:

> A lawyer shall treat with courtesy and respect all persons involved in the legal process. A lawyer shall take particular care to avoid treating such a person discourteously or disrespectfully because of the person's race, gender, or other protected personal characteristic. To the extent possible, a lawyer shall require subordinate lawyers and nonlawyer assistants to provide such courteous and respectful treatment.

MRPC 8.4 provides in relevant part:

> It is professional misconduct for a lawyer to:
>
> (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
>
> * * *
>
> (c) engage in conduct that is prejudicial to the administration of justice.

It is a sad commentary on the current state of the practice of law that there is a developing caselaw on assaults, abusive language, and other incivilities occurring in the course of depositions.

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[3]Our findings should not be taken as an endorsement of physical combat, but rather are simply our interpretation of what would have constituted a normal reflex or reaction if Mr. Paterra in fact had felt threatened. See Grievance Administrator v. Donald H. Stolberg, No. 95-72-GA; 95-107-FA (ADB 1996).

See, e.g., Attorney Discipline Board v. Fink, 96-181-JC (ADB 2001) (abusive language and physical struggle during deposition); Grievance Administrator v. Golden, 96-269-GA (ADB 1999) (physical struggle during deposition); Grievance Administrator v. Leonard B. Segel, 95-210-GA (ADB 1998) (abusive language and obstructive conduct during deposition). We recognize that Respondent believed that his opposing counsel had acted unethically, and we have noted some support for Respondent's contention.[4] However, as the Board noted in Leonard B. Segal, "[W]e have even greater reservations, which we have previously expressed, about the very notion that provocation excuses this kind of conduct. Grievance Administrator v. Donald H. Stolberg, No. 95-72-GA; 95-107-FA (ADB 1996) (disapproving of provocation as a 'justification,' but dismissing case on other grounds); Grievance Administrator v. Neil C. Szabo, No. 96-228-GA (ADB 1998) ('The answer to uncivil conduct is not escalation.')." Leonard B. Segal, 95-210-GA at 7. "[A] claim of provocation cannot automatically serve as a defense to, or excuse for, conduct such as this. Were we to hold otherwise we would be encouraging a downward spiral in the conduct of members of the bar." Id.

We recognize that the grievousness of Respondent's conduct in this case fell far short of that which was held improper in other cases. Of the charges in the formal complaint, we reject as not proven the allegation that Respondent "challenged Attorney Paterra to a physical altercation." (Formal Complaint, ¶ 10(a). The transcript of the deposition does twice reflect Respondent stating "let's go." (Petitioner's Exhibit 1, at 57.) The first statement appears to have been cut off, and likely would have been, as Respondent testified, a request to go off the record in attempt at conciliation. (McKeen: Hearing Tr. at 89.) The second statement is more ambiguous, and is followed by a more ominous sounding "You don't ever say that to me again ever," but again this falls short of a clear demonstration of intent to clash physically. Moreover, the most objective witness, court reporter Joanne Smith, did not perceive Respondent's conduct to be a threat or an invitation to fight. (Smith: Hearing Tr. at 20-21.)

The Formal Complaint also alleged that Respondent "grasped Attorney Paterra's tie, and pulled on it in a threatening and assaultive manner." (Formal Complaint, ¶ 10(b).) Respondent admits that he grasped Mr. Paterra's tie, and it is that act which forms the basis for our finding of misconduct. The most disputed fact in the entire hearing was what Respondent did with the tie after having grasped it. As noted above, we have concluded that Respondent certainly did not pull

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[4]Respondent seems to labor under the misconception that the nature of the case, and the fact that he represented an injured child, provides some sort of justification for, or explanation of, his conduct. See Petitioner's Exhibit 2 (Respondent's Response to Request for Investigation, dated June 25, 1999) at 1 ("This case concerns a baby girl who had been under the care of defendant Henry Ford Health System who the defendant failed to diagnose as suffering from nutritional Rickets. As a result of the defendant's negligence, the baby suffered a cardiopulmonary arrest and severe, permanent brain damage. As a result of her injuries, the little girl faces a life of hardship and disability."); id at 6 ("I do regret my unfortunate lack of discretion in touching Mr. Paterra's tie. I would, however, respectfully request that the Commission consider as a mitigating circumstance the pervasive and repetitive nature of Mr. Paterra's misconduct which was designed to prejudice an innocent little girl who suffered a permanent brain injury as the result of the negligent medical care.). Respondent's immediate statement by way of apology or explanation after grabbing Mr. Paterra's tie was "Listen, I'm representing an injured child. You're trying to coach him through – [.]" (Petitioner's Exhibit 1, at 58.) Needless to say, the Michigan Rules of Professional Conduct apply at all times, in all cases, with equal force; there is no sliding scale based on the (perceived) importance of the case or matter at hand. Moreover, to the extent that provocation is an issue, we note that it was Respondent, who, fairly early in the deposition, in response to an arguably improper objection, told opposing counsel to "Shut up." (Id at 19.) It also was Respondent who, in the colloquy leading up to the tie-grabbing incident, first stated to opposing counsel "You're a weasel." (Id at 57.) As we have noted, there was more than enough bad behavior on the part of both Respondent and Mr. Paterra to go around.

the tie "in a threatening or assaultive manner." (Id.) We conclude that Respondent either let the tie drop from his hand, or, at most, gave it a slight pull. This interpretation of events is based on what the court reporter observed (a single, slight pull on the tie). In fact, what the court reporter saw may well have been Respondent simply letting the tie drop from his hand, as he testified, which in the heat of the moment could have been confused with a slight tug. Nonetheless, even the slight, uninvited and unwelcome touching was a battery,[5] was certainly prejudicial to the administration of justice, MRPC 8.4(c), and certainly was discourteous to and disrespectful of someone involved in the legal process. MRPC 6.5(a).

Respondent made a number of arguments based on the ABA Standards for Imposing Lawyer Discipline. While it may be that Respondent's arguments have merit, the ABA Standards are applicable to the decision of what level of discipline to impose upon a finding of misconduct, not for the initial finding of whether Respondent committed misconduct. See Grievance Administrator v. Albert Lopatin, 462 Mich. 235, 238, 612 N.W. 2d 120, 123 (2000) (emphasis added) ("Today, we direct the ADB and hearing panels to follow the ABA Standards for Imposing Lawyer Sanctions *when determining the appropriate sanction for lawyer misconduct*."); ABA Standards for Imposing Lawyer Sanctions (1991 Ed.), § II (standards are for use by body "imposing sanctions."). The ABA Standards have no role in our threshold decision of whether or not misconduct occurred. See MCR 9.115(J)(1). For the reasons stated, we find that there was professional misconduct, and a hearing will be set to consider aggravating and mitigating factors. See MCR 9.115(J)(2). Respondent at that time will be free to make whatever argument he wishes based on the ABA Standards.[6]

ATTORNEY DISCIPLINE BOARD
Tri-County Hearing Panel #25

By: _____
Jonathan Tukel, Chairperson

[5] See W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 9 (5th ed. 1984) (Battery is an offensive contact with a person, resulting from an act intended to cause the person to suffer such a contact; id and n.8 ("if all other requisites of a battery against the plaintiff are satisfied, contact with the plaintiff's clothing" constitutes battery.); Michigan CJI 2d 17.1 ("A battery is . . . offensive touching of the person or something closely connected with the person of another.")

[6] Respondent argued that there was no ABA Standard applicable to the conduct charged in this case. (Hearing Tr. at 66-68.) We express no opinion on that question. We do note, however, that the ABA Standards are only a starting point for determining the discipline, if any, to impose. See Lopatin, 462 Mich. at 248 n.13, 612 N.W. 2d at 128 n.13 (the "directive to follow the ABA Standards is not an instruction to abdicate the[] responsibility to exercise independent judgment.") Thus, this panel must consider whether "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 precedent of this Court or the ADB," and if it so finds, must impose a different sanction and explain its reasons. Id. The panel notes one precedent of the ADB which may have relevance at the sanction hearing and which the parties should be prepared to argue: "Our decision to impose a suspension of 60 days - even though respondent has practiced with an unblemished record for over 37 years and this was an isolated incident which ended without physical injury to anyone – reflects our unwillingness to tolerate this type of behavior . . .lawyers can expect that conduct rising to the level of physical assault while performing their legal duties will generally result in suspension." Grievance Administrator v. Robert Golden, 96-269-GA (ADB 1999).

STATE OF MICHIGAN
ATTORNEY DISCIPLINE BOARD

GRIEVANCE ADMINISTRATOR,
Attorney Grievance Commission

[Entered: September 12, 2002]

Petitioner

v

Case No. 00-61-GA

BRIAN J. MCKEEN (P34123)

Respondent
_____/

REPORT ON SANCTIONS HEARING
BY TRI-COUNTY HEARING PANEL NO. 25

At a session of the Panel held at
211 West Fort Street, Ste. 1400, Detroit, Michigan

PRESENT: Jonathan Tukel, Chairperson
Francis P. Kuplicki, Member
Howard I. Wallach, Member

APPEARANCES: Ruth Ann Stevens, Esq., for Petitioner
Michael Alan Schwartz, Esq., for Respondent

WITNESSES: Jeremiah Kenney, for Respondent
Honorable Kaye Tertzag, for Respondent
David Patton, for Respondent

I. REVIEW OF MISCONDUCT

On April 10, 2000, the Attorney Grievance Commission charged Respondent, Brian J. McKeen, by a formal Complaint with violations of MRPC 6.5(a) (requiring lawyers to treat persons involved in the legal process with courtesy and respect), 8.4(a) (proscribing knowing violation of the Rules of Professional Conduct), and 8.4(c) (proscribing conduct that is prejudicial to the legal profession). A complete account of

the Respondent's conduct is set forth in this Panel's November 20, 2001 Report on Misconduct.

In sum, this Panel found that, after a heated verbal exchange between Respondent and opposing counsel during a deposition Respondent was conducting, Respondent got out of his chair, approached opposing counsel, grabbed opposing counsel's tie, let it drop, and went into the hallway with opposing counsel where he apologized for his behavior. Based on these facts, this Panel found that Respondent violated MRPC 6.5(a) and MRPC 8.4(c). Consequently, this Panel conducted a hearing on discipline pursuant to MCR 9.115(J)(2) on May 14, 2002 and now issues this Report on Sanctions.

II. REVIEW OF EXHIBITS AND TESTIMONY OF WITNESSES

At the sanctions hearing, the Grievance Administrator called no witnesses. The Grievance Administrator offered two exhibits. See Petitioner's Exhibits 5 (November 25, 1997 letter admonishing Respondent for not taking steps necessary to promptly evaluate a client's claim and notifying the client only 15 days prior to the expiration of the statute of limitations that Respondent would not handle the case) and 6 (September 27, 1999 letter admonishing Respondent for failing to adequately supervise a former associate and for failing to adequately communicate with a client). These were admitted into evidence without objection.

Respondent presented three witnesses. Jeremiah Kenney, a Michigan attorney since 1975, testified that he and Respondent have been frequent adversaries, squaring off in some 30 to 100 medical malpractice cases. Sanction Hearing Tr. at 8. Mr. Kenney indicated that he has never had a problem dealing with Respondent. Respondent's

demeanor, professionalism, and civility have always been appropriate. Mr. Kenney stated that he and Respondent have always been able to work out pre-trial disputes without court intervention. Sanction Hearing Tr. at 9. Mr. Kenney views Respondent as a tough negotiator, but said he never heard Respondent use profanity directed at another attorney or litigant and never observed Respondent lose his temper. Sanction Hearing Tr. at 12-13. Mr. Kenney said he would rate Respondent with the highest levels of competence and ethical behavior. Sanction Hearing Tr. at 10. Mr. Kenney stated that he has no personal relationship with Respondent. Sanction Hearing Tr. at 14.

The Honorable Kaye Tertzag, Wayne County Circuit Court Judge, also testified. He indicated that he first met Respondent at a Downriver Bar Association event many years ago. Sanction Hearing Tr. at 16. He was impressed with Respondent and has subsequently observed Respondent ten or more times in the courtroom at both motions and at trial. Sanction Hearing Tr. at 17. Judge Tertzag described Respondent's demeanor as always civil. Sanction Hearing Tr. at 10. He testified that Respondent has always conducted himself with the highest degree of professionalism. Sanction Hearing Tr. at 14.

David Patton, an attorney since 1969, also testified favorably regarding Respondent's character. He estimated ten to 15 cases in which he opposed Respondent. Sanction Hearing Tr. at 26. Mr. Patton described Respondent as always civil, never offensive or unprofessional albeit zealous in his representation. Sanction Hearing Tr. at 27. Mr. Patton testified that Respondent does not have a reputation as an uncivil or unprofessional attorney. Sanction Hearing Tr. at 32.

III. REPORT ON SANCTIONS

Pursuant to Grievance Administrator v Lopatin, 462 Mich 235, 238, 612 NW2d 120, 123 (2000), this Panel is required to follow the ABA Standards for Imposing Lawyer Sanctions. Lopatin requires this Panel to apply the following analysis:

> First, the following questions must be addressed: (1) What ethical duty did the lawyer violate? (A duty to a client, the public, the legal system or the profession?); (2) What was the lawyer's mental state? (Did the lawyer act intentionally, knowingly, or negligently?); and, (3) What was the extent of the actual or potential injury caused by the lawyer's conduct? (Was there a serious or potentially serious injury?).
>
> The second step of the process involves identification of the applicable standard(s) and examination of the recommended sanctions. Third, aggravating and mitigating factors are considered. Finally, "panels and the [Attorney Discipline] 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."

Grievance Administrator v Golden, 96-269-GA (ADB 2001), p 1 citing Lopatin, 462 Mich at 248 n 13, Grievance Administrator v Fink, 96-181-JC (ADB 2001), and Grievance Administrator v Musilli, 98-216-GA (ADB 2000). Answering these questions aids in the selection of the appropriate sanction recommended by the ABA Standards. Golden, supra at 2.

A. Duties Violated, Lawyer's Mental State, and Injury or Potential Injury

1. Duties Violated

Respondent's misconduct during the deposition violated duties he owed to the legal system and to the legal profession.

2. Respondent's Mental State

The ABA Standards define three levels of mental consciousness applicable to attorney misconduct. An "intentional" act is "the conscious objective or purpose to accomplish a particular result." A "knowing" act is "the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result." And, a "negligent" act is "the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation." See ABA Standards Definitions.

The record does not support a finding that Respondent's conduct was "intentional" as that term is defined under the ABA Standards. By getting out of his chair, approaching opposing counsel, and grabbing opposing counsel's tie in a non-threatening manner, it does not appear that Respondent intended to accomplish a particular result. At most, his intentions were unclear.

However, Respondent's conduct was "knowing". After getting out of his chair, approaching opposing counsel, and grasping opposing counsel's tie, Respondent immediately let go and apologized to opposing counsel in the hallway. This indicates a "conscious awareness of the nature or attendant circumstances of the conduct" consistent with the ABA Standards definition of "knowing". Moreover, even if not "knowing", Respondent's conduct was negligent. He failed to heed a "substantial risk" that adverse circumstances would follow his improper conduct. Respondent's failure was "a deviation from the standard of care that a reasonable lawyer would exercise in

the situation." Respondent demonstrated the requisite mental state to warrant discipline under the ABA Standards.

3. Injury or Potential Injury

In determining the "extent of the actual or potential injury caused by the lawyer's conduct", it is important to acknowledge that this is neither a criminal proceeding against Respondent nor a civil action between Respondent and opposing counsel. Respondent's misconduct violated duties he owed to the legal system and to the legal profession, not duties Respondent owed to the opposing counsel whose tie he grabbed in an individual capacity. Consequently, while it is important to consider the fact that the opposing counsel sustained no physical injury, this does not mean that Respondent's conduct caused no injury to the legal system or to the legal profession. On the contrary, by introducing to the deposition an unwelcome physical touching, albeit a non-threatening one, Respondent threatened injury to a key process by which adversaries gather information in civil litigation.

This was the subject of the Attorney Discipline Board's decision in Golden. In that case, the respondent grabbed opposing counsel during a deposition in order to recover an exhibit. Respondent briefly held opposing counsel in a headlock until counsel for a third party took possession of the exhibit. Respondent was suspended for 60 days as the result of his behavior – the Board finding that (in addition to concerns for the potential physical injury to the attorney assaulted) "interference with a legal proceeding is cognizable under the [ABA] Standards and constitutes misconduct". Golden, supra at 2.

As a result, the actual injury (interference with the deposition) or potential for injury (violence) in this instance was sufficient to warrant discipline under the ABA Standards.

B. Applicable ABA Standards

Having answered the preliminary questions as to warrant the imposition of a sanction, this Panel must identify the applicable ABA Standards for determining the appropriate sanction. The Grievance Administrator argues that Respondent's conduct violated ABA Standards 5.12 and 6.22. ABA Standard 5.12 provides:

> 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 conduct seriously adversely reflects on the lawyer's fitness to practice law.

While the Panel recognizes that legitimate arguments exist to support a finding that Respondent knowingly engaged in criminal conduct which does not contain the elements listed in ABA Standard 5.11, we decline to make a formal ruling on this factor because we find that the second factor of ABA Standard 5.12 has not been satisfied. Respondent's conduct does not "seriously adversely" reflect on the lawyer's fitness to practice law. Respondent's behavior did not rise to the level of the assaultive conduct in Golden or other recent cases involving deposition misconduct. See, e.g., Fink, supra (respondent shoved attorney deponent), Grievance Administrator v Lakin, 96-116-GA (ADB 1997) (respondent who struck opposing counsel and put forefinger into opposing counsel's forehead), and Grievance Administrator v Krupp, 94-178-GA (ADB 1995) (respondent who used profanity directed at opposing counsel, threw a pen at opposing counsel, and threatened physical violence). Accordingly, we turn to ABA Standard 6.22.

[DISCUSSION OF STANDARD 6.22 OMITTED
Pages 8-10 of HP Report on Sanctions]

[Page 10 continued]

As a result, we are left without clear direction from the ABA Standards to determine the appropriate discipline in this case. We turn, then, to consider aggravating and mitigating circumstances and precedent to determine what discipline is appropriate.

C. Aggravating and Mitigating Factors

At the hearing on discipline, the Grievance Administrator offered Petitioner's Exhibits 5 and 6 to prove prior instances of discipline involving Respondent. However, the nature of Respondent's prior misconduct is so different from the circumstances in this matter, that they do not constitute aggravating factors that "justify an increase in the degree of discipline to be imposed." ABA Standard 9.21.

Respondent presented three witnesses to vouch for Respondent's professionalism. This Panel finds all of the witnesses to be credible and helpful in demonstrating that Respondent's conduct under scrutiny in this instance was atypical behavior. Beyond this demonstration of Respondent's good character, Respondent offered no evidence of other mitigating circumstances in this instance.

D. Appropriate Level of Discipline

As indicated above, while ABA Standard 6.22 speaks of suspension for a knowing interference with a legal process, our analysis indicates that ABA Standard 6.22 is not helpful in determining the appropriate discipline in this case. It is clear to the **[Page 11]** Panel, however, that the facts of this case do not warrant suspension. Accord Wallach dissent (attached).

But, as set forth in the ABA Standards:

> [T]he Standards are not designed to propose a specific sanction for each of the myriad of fact patterns of cases of lawyer misconduct. Rather, the Standards provide a theoretical framework to guide the courts in imposing sanctions. The ultimate sanction imposed will depend upon the presence of any aggravating or mitigating factors in a particular situation. The Standards thus are not analogous to criminal determinate sentences, but are guidelines which give courts the flexibility to select an appropriate sanction in each particular case of lawyer misconduct.

See ABA Standards, p 6. Moreover, "[I]n the rare case where the mitigating factors clearly outweigh the aggravating factors as well as the nature and harm of the misconduct, an order of no discipline may still be appropriate." Grievance Administrator v Bowman, 462 Mich 582, 589, 612 NW2d 820, 823 (2000) (citation omitted). "We endorse the following statement made by the ADB: 'The fact that a "no discipline" option exists does not mean that it should be employed often. The option should be exercised quite sparingly by panels and the Board.'" Id., n 14.

Acknowledging that the facts of this case are not as egregious as other instances of assaultive behavior during depositions, the Grievance Administrator asked that Respondent be reprimanded. See Sanction Hearing Tr. at 46. Respondent requested that no discipline be imposed. This Panel believes the Grievance Administrator's recommendation is sound.

As suggested above, and acknowledged by the Grievance Administrator, the severity of the conduct under scrutiny here is less than the conduct sanctioned in **[Page 12]** Golden. It is appropriate, therefore, that the discipline imposed be less. The 60 day suspension upheld in Golden would not be appropriate in this case. But some form of discipline is necessary. This is not one of those "rare cases," Bowman, 462

Mich at 589, 612 NW2d at 823, where a finding of no discipline is appropriate. While the conduct is not as severe as in other cases, neither are there mitigating factors which "clearly outweigh the aggravating factors as well as the nature and harm of the misconduct." Id.

As stated in Golden:

> Our decision to impose a suspension of 60 days – even though respondent has practiced with an unblemished record for over 37 years and this was an isolated incident which ended without physical injury to anyone – reflects our unwillingness to tolerate this type of behavior. We will continue to review and decide these matters on a case-by-case basis, as is the rule in attorney discipline proceedings. However, we will not forget that persons involved in the legal process are engaged in an undertaking vital to our society.
>
> When a client counsels with an attorney or when a person participates in some phase of litigation, the greater end involves – and should strengthen – the rule of law. We cannot ask all citizens to conduct their legal affairs and the pursuit of justice in accordance with a process which the lawyers themselves abandon when it becomes inconvenient. For these reasons 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. However, we hereby serve notice on the profession that its members should, before acting, reflect on the fact that these cases will be taken seriously by this Board.

[Page 13] Golden, supra, p 2-3. While the severity of Respondent's conduct obviously is less than that of the respondent in Golden, the same concerns apply. This Panel

believes there can be no tolerance of unwelcome touching that could lead to violence in the legal process.

Consequently, considering precedent and the circumstances of this case, this Panel concludes that Respondent should be reprimanded. A reprimand appropriately balances this Panel's factual findings with its concern for maintaining professionalism within the Bar. A reprimand endorses the notice the Attorney Discipline Board intended to send in Golden yet does not vilify a capable attorney whose record, based on the evidence before this Panel, is otherwise good. A reprimand will force Respondent to give pause regarding his behavior, but not threaten his livelihood.

IV. CONCLUSION

Respondent engaged in professional misconduct. His discourteous conduct reflects poorly on the profession and cannot be ignored. By his unwelcome touching during a deposition, a technical assault, Respondent introduced an element of physicality that has no place in the legal process. While a reprimand is a minimal level of discipline, it is an appropriate sanction given the facts of this case.

ATTORNEY DISCIPLINE BOARD
Tri-County Hearing Panel #25

By:_____
Jonathan Tukel, Chairperson

By:_____
Francis P. Kuplicki, Member

STATE OF MICHIGAN

ATTORNEY DISCIPLINE BOARD

GRIEVANCE ADMINISTRATOR, [Entered: September 12, 2002]
Attorney Grievance Commission,

Petitioner,

v Case No. 00-61-GA

BRIAN J. MCKEEN (P34123)

Respondent.
_____/

Dissent by Howard I. Wallach, Member.

I. REVIEW OF MISCONDUCT

I respectfully dissent. On April 10, 2000, Respondent, Brian J. McKeen, was charged by formal Complaint with violations of MRPC 6.5(a), 8.4(a) and 8.4(c). On November 20, 2001, this Panel issued a Report on Misconduct (ROM). We rejected as not proven the allegation that Respondent "challenged Attorney Paterra to a physical altercation." This Panel did, however, find misconduct in the Respondent's "touching" (not grabbing as the majority now states[1]) of Attorney Paterra's tie, although we did not believe that he pulled on it "in a threatening or assaultive manner." Accordingly, Respondent's conduct was found to be in violation of MRPC 6.5(a), being discourteous to or disrespectful to someone involved in the legal process and MRPC 8.4(c), prejudicial to the administration of justice. Consequently, a sanctions hearing was scheduled pursuant to MCR 9.115(J)(2).

[1] See, Report on Misconduct, p 4.

It is undisputed that the basic goal of our disciplinary system is to protect "the public, the courts, and the legal profession". MCR 9.105. Pursuant to *Grievance Administrator v Lopatin*, 462 Mich 235, 238; 612 NW2d 120 (2000), this Panel is required to follow the ABA Standards for Imposing Lawyer Sanctions when determining the appropriate sanction for lawyer misconduct. In *Grievance Administrator v Musilli*, 98-216-GA (ADB 2000), the Attorney Discipline Board (ADB) applied the ABA Standards utilizing the theoretical framework adopted in *Lopatin* restated as follows:

> First, the following questions must be addressed: (1) What ethical duty did the lawyer violate? (A duty to a client, the public, the legal system or the profession?); (2) What was the lawyer's mental state? (Did the lawyer act intentionally, knowingly, or negligently?); and, (3) What was the extent of the actual or potential injury caused by the lawyer's conduct? (Was there a serious or potentially serious injury?).
>
> The second step of the process involves identification of the applicable standard(s) and examination of the recommended sanctions. Third, aggravating and mitigating factors are considered. Finally, "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.

However, the *Lopatin* Court cautioned the ADB and hearing panel's not to abdicate the duty to exercise independent judgment and apply existing precedent, rather than blindly follow the ABA Standards stating:

> 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.

Accordingly, we must not only apply the theoretical framework established by the ABA Standards and adopted in *Lopatin*, but we must apply precedent from our Supreme Court and the ADB in determining an appropriate sanction in this case.

II. REVIEW OF EXHIBITS AND TESTIMONY OF WITNESSES

The Grievance Administrator called no witnesses at the sanctions hearing. Two (2) Exhibits were, however, admitted into evidence without objection. Petitioner's Exhibit 5 is a letter of admonishment issued to Respondent on November 25, 1997. In that case Respondent was admonished for not taking steps necessary to promptly evaluate a client's claim and giving the client only fifteen (15) days prior to the expiration of the statute of limitations to seek new counsel when he declined to handle the matter. Petitioner's Exhibit 6 is a letter of admonishment issued to Respondent on September 27, 1999. In that case the Respondent was admonished for failing to adequately supervise a former associate and communicate with his client.

The Respondent offered three (3) witnesses who testified regarding their personal experiences with him either as opposing counsel or as a Judge before whom Respondent has appeared. The first witness was Jeremiah Kenney. Mr. Kenney has been an attorney since 1975. He has no personal relationship with the Respondent, but has been his adversary on between thirty (30) and one hundred (100) medical malpractice cases. He has never had a problem dealing with the Respondent in terms

of his demeanor, professionalism, or civility. In all of the cases they have handled together, Mr. Kenney does not remember ever having to appear in court on a contested motion prior to a case going to trial, as Mr. Kenney and the Respondent were always able to work out whatever disagreements or disputes they had regarding pretrial matters. Although Mr. Kenney views the Respondent as a tough negotiator, he has never heard him lose his temper or use profanity directed at an attorney or litigant. He described the Respondent as being a zealous advocate for his clients and one whom, if he were ever asked, would rate with the highest levels of competence and ethical behavior in Martindale-Hubbell. Tr, pp7-14.

The second witness to testify was the Honorable Kaye Tertzag. Judge Tertzag was admitted to the bar in 1969. He has been a Wayne County Circuit Court Judge for the past sixteen (16) years. He met Mr. McKeen when Respondent spoke at a Downriver Bar Association function many years ago. He has observed Respondent ten (10) or more times in his courtroom appearing on motions and at trial. He described Respondent's demeanor as always being civil and with the highest degree of professionalism. Judge Tertzag was impressed with Respondent's passion for legitimately injured clients and his zealous advocacy on behalf of those clients. When asked if he has ever observed the type of behavior by Respondent which occurred in this case, Judge Terzag testified that such behavior would be totally out of character for the Respondent based upon his personal observations. Tr, pp15-23.

The last witness to testify was attorney David Patton. He has been an attorney since 1969. He was formerly a special agent with the Federal Bureau of Investigation, has worked for two (2) law firms, and since 1988 has had his own law firm where he

does both plaintiff and defense litigation. Mr. Patton has been the Respondent's adversary between ten (10) and fifteen (15) times. He described Respondent's demeanor as always civil, never offensive or unprofessional and always zealous in his representation of his clients. On several occasions he has witnessed defense lawyers trying to bait the Respondent with inappropriate behavior, but Respondent has never taken the bait. When asked by two of the Panel members whether there is a "book" on the Respondent among members of the defense bar which suggests that if you push Respondent's buttons appropriately you can get him angry to the point of distracting him or engaging him in unprofessional or uncivil behavior, Mr. Patton denied ever hearing of Respondent having such a reputation. While Mr. Patton agreed that the conduct engaged in by the Respondent in this case was certainly inappropriate, he has never seen the Respondent be uncivil or unprofessional in any manner, win or lose, in any of the many cases they have had with each other. Tr, pp 24-36.

III. REPORT ON SANCTIONS

A. Duties Violated, Lawyer's Mental State & Injury or Potential Injury

1. Duty or Duties Violated

Respondent's misconduct is a violation of the duty owed to the legal system. ABA Standards 6.0.

2. Respondent's Mental State

The ABA Standards define three levels of mental consciousness applicable to alleged misconduct. First, an intentional act "is the conscious objective or purpose to accomplish a particular result." Second, a knowing act "is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious

objective or purpose to accomplish a particular result." Third, a negligent act "is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation." ABA Standards Definitions. While volitional, Respondent's conduct here was not intentional because he was not acting in a manner to accomplish a particular result. On the contrary, Respondent's conduct was the product of a momentary lapse in judgment or control. He testified as to his extreme frustration due to the repeated coaching of witnesses later found to be improper by Judge Borman. Therefore, his conduct was not "knowing" as defined by the ABA Standards. Accordingly, I find Respondent's mental state to have been negligent because he failed to "heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation."

3. <u>Extent of Actual or Potential Injury</u>

Even though Attorney Paterra was not "a client or a party" and therefore would not be covered by ABA Standard 6.22 were we to apply its terms literally, there is no credible evidence of injury, as defined in the ABA Standards, to Attorney Pattera. I also find that the touching of Attorney Paterra's tie did not rise to the level of a potential injury, as defined in the ABA Standards, because we found "Respondent touched the tie a single time, not more than halfway up, did not pull or jerk it violently, and released it." While inappropriate, this conduct does not amount to "harm to a client, the public, the legal system or the profession that is reasonably foreseeable at the time of the lawyer's misconduct, and which, but for some intervening factor or event, would probably have

resulted from the lawyer's misconduct." ABA Standards Definitions. This was a momentary lapse in judgment that was over so quickly Attorney Paterra testified he never moved in his chair, stood up or took any defensive position. There was no intervening factor or event. Respondent simply realized what he was doing was wrong and stopped immediately.

B. Applicable ABA Standards

In this case the Grievance Administrator argues the Respondent's conduct violated ABA Standards 5.12 and 6.22. Standard 5.12 reads as follows:

> 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 conduct seriously adversely reflects on the lawyer's fitness to practice law.

Standard 5.12 is written in the conjunctive. Accordingly, two factors must be present for a violation of this Standard to have occurred. First, the lawyer must have knowingly engaged in criminal conduct which does not contain the elements listed in Standard 5.11. While I agree with the majority that legitimate arguments exist to support a finding that this factor of the Standard has been satisfied, I likewise decline to make a formal ruling on this factor because I find that the second factor of this Standard has not been satisfied, i.e. the conduct must "seriously adversely" reflect on the lawyer's fitness to practice. See, *Grievance Administrator v Fink*, 96-181-JC, p 6-7(ADB 2001). Accordingly, I now turn to a review of Standard 6.22. That Standard reads as follows:

> 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.

This Standard has two components. First, the lawyer must know that he or she is violating a court order or rule. Second, the violation must either cause injury or potential injury to a client or a party, or cause interference or potential interference with a legal proceeding. There has been no argument made, nor evidence produced, that any court order was violated. Accordingly, for this Standard to apply under the facts in this case, we must be satisfied that Respondent's conduct violated a rule and that it caused interference or potential interference with a legal proceeding since we have already rejected the claim of injury to Attorney Pattera. I cannot come to such a conclusion. As we noted in our ROM, "Although the conduct engaged in by all counsel may well have been below that which is required by Michigan attorneys, the sole question before us is whether Mr. McKeen engaged in unprofessional conduct". ROM, p 2. While it is unfortunate that each of the lawyers in this case engaged in behavior that was inappropriate[2], interruptions, adjournments and continuations of depositions occur on a daily basis for a multitude of reasons. Here, Respondent was taking the deposition of a key defendant doctor and his misconduct resulted in the deposition being suspended. The suspension inured to the benefit of Attorney Paterra's client, the deponent, since it gave Attorney Pattera more time to prepare his client for the balance of the deposition. That, of course, does not justify or excuse the misconduct committed by the Respondent. However, the misconduct certainly did not rise to the level of

[2] The record before us includes a transcript of a hearing before Wayne County Circuit Court Judge Susan Borman following the deposition incident that gave rise to this case. In that hearing, Judge Borman found that Attorney Paterra's conduct in coaching witnesses was inappropriate. Respondent's Exhibit 3, pp 4-7. In my opinion such conduct is also a violation of the Rules of Professional Conduct and may even amount to inciting one to commit perjury (MCL § 750.425) and an attempt to obstruct justice. See, MRPC 3.4(a), (b) and 8.4(c) and MCL § 750.505. When asked what sanction would be appropriate for an attorney who engaged in the misconduct committed by Attorney Paterra, counsel for the Grievance Administrator indicated she was not aware of any case where an attorney had been formally charged with misconduct based upon such facts and, therefore, she would need to review the Standards before responding. Tr, p 48.

causing "interference" with the proper administration of justice as our Supreme Court has interpreted that term in the past. See, *Grievance Administrator v Fried*, 456 Mich 234, 570 NW2d 262 (1997).

Similarly, the misconduct did not cause "interference or potential interference with a legal proceeding" to the extent that it obstructed the matter from proceeding to a conclusion in a reasonable time based upon the schedule established by the court. Compare, *In re Conduct of Wyllie*, 326 Or 447; 952 P2d 550 (1998) where an attorney was suspended for one year after appearing in court intoxicated several times resulting in at least two of the cases being delayed; *In re Vincenti*, 92 NJ 591; 458 A2d 1268 (1983) where an attorney was suspended for making repeated discourteous, insulting and degrading verbal attacks on the judge and his rulings which substantially interfered with the orderly trial of a case; and *Florida Bar v Rosenberg*, 387 So 2d 935 (Fla 1980) where an attorney was reprimanded for harassing delaying tactics which interfered with the trial of a case.

Here, there is no evidence that even minimally suggests that the brief incident that occurred in this case and caused the temporary suspension of the deposition in any way interfered with the underlying case proceeding to its conclusion in a timely fashion. In fact, the opposite is true. Respondent's Sanction Phase Memorandum informed the Panel that the underlying case was tried before a Wayne County Circuit Court jury in late 2001.

C. <u>Aggravating and Mitigating Factors</u>

Having thoroughly reviewed each of the Exhibits offered by the Grievance Administrator, I likewise find that the nature of the misconduct in each of those cases is

so distinctly different from the nature of the misconduct in this case that they do not constitute aggravating factors that "justify an increase in the degree of discipline to be imposed." ABA Standard 9.21.

D. Appropriate Level of Discipline

As the ABA Standards note,

> [T]he Standards are not designed to propose a specific sanction for each of the myriad of fact patterns of cases of lawyer misconduct. Rather, the Standards provide a theoretical framework to guide the courts in imposing sanctions. The ultimate sanction imposed will depend upon the presence of any aggravating or mitigating factors in that particular situation. The Standards thus are not analogues to criminal determinate sentences, but are guidelines which give courts the flexibility to select an appropriate sanction in each particular case of lawyer misconduct. See, ABA Standards, p 6.

In this case, the Grievance Administrator argues that Respondent's misconduct warrants a reprimand. The Respondent argues no discipline is needed or appropriate. In *Grievance Administrator v Deutch*, 455 Mich 149; 565 NW2d 369 (1997), the Supreme Court held that "hearing panels do have the discretion to issue orders of discipline appropriate to the specific factors of a case, including orders that effectively impose no discipline". *Id* at 169. In *Deutch*, each of the respondents was convicted of drunk driving. The Court found that hearing panels do not have the authority to dismiss a case at the first stage of the disciplinary process when the Grievance Administrator has filed a judgment of conviction. However, the Court expressly noted that

> MCR 9.106 echoes the language in MCR 9.104, which states that a finding of "misconduct" is only "*grounds* for discipline," not that a finding of misconduct requires the imposition of discipline in every case. Where notions of justice and fairness require, we hold that the order of discipline required under MCR 9.115(J)(1) and (3), could

> include an order that effectively imposes no discipline on an attorney. 455 Mich at 163.

The Court went on to note, "Finally in the rare case where the mitigating circumstances clearly outweigh any aggravating factors and the nature and harm of the crime, the Panel may decide to forgo the imposition of discipline at all." 455 Mich at 163, n 13.

Moreover, the Commentary to MRPC 8.4 makes it clear that not all transgressions by an attorney warrant disciplinary sanctions.

> Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. *However, some kinds of offenses carry no such implications.* Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses that have no specific connection to the fitness to practice law. Although a lawyer is personally answerable to the entire criminal law, *a lawyer should be professionally answerable only for those offenses that indicate lack of those characteristics relevant to law practice.* Offenses involving *violence*, dishonesty, breach of trust, or *serious interference* with the administration of justice are in that category. (Emphasis supplied.)

Consequently, if Respondent had been found to have engaged in a criminal offense not involving violence or any other aggravating factors, the Commentary makes clear that no discipline would be imposed. This is consistent with *Deutch*, *supra.* Therefore, it is appropriate for us to now consider precedent as we were directed in *Lopatin*.

In recognition of the increased lack of civility and repeated instances of physical confrontation among lawyers, this Panel directed the parties to be prepared to discuss

the implications of *Grievance Administrator v Golden*, 96-269-GA (ADB 1999). ROM, p 7, n 6. In that case, as in the case before this Panel, an attorney engaged in misconduct at a deposition. The respondent there assaulted his opposing counsel in an attempt to recover documents produced by a deponent to prevent them from being marked as an exhibit. The hearing panel's finding of misconduct was affirmed by the ADB, but the 180-day suspension was reduced to 60 days. Finding that respondent had an unblemished record for over 37 years and that the incident at the deposition was an isolated one, which ended without physical injury to anyone, the ADB felt a reduction in the discipline was appropriate. The ADB went on, however, to note that while lawyers "can expect that conduct rising to the level of a physical assault" will generally result in a suspension, it does not "mean that a suspension will be warranted whenever an attorney touches another person involved in the legal process." *Golden, surpa* at p 5.

The facts in *Golden* are distinctly different from those in this case. In *Golden* the respondent violently grabbed his opposing counsel and put him in a headlock. Here we found that "Respondent touched [Attorney Paterra's] tie a single time, not more than halfway up, did not pull or jerk it violently, and released it." We further found that Respondent did not pull the tie in a "threatening or assaultive manner." ROM, p 6. Respondent *Golden's* behavior was so aggressive that it crossed the threshold and "seriously adversely" reflected on his fitness to practice. There was no evidence of such aggressiveness in this case. In fact, within moments of the incident, Respondent and Attorney Paterra walked together to a hallway where Respondent apologized.

In *Fink*, *supra*, the respondent ran around a conference table and attacked opposing counsel causing him to fall to the ground. The ADB reprimanded Mr. Fink who was convicted of a misdemeanor assault for fighting with opposing counsel during a deposition. In that case, the ADB was asked to consider whether the respondent's conduct violated Standard 5.12 and rejected the request stating "this particular shoving incident does not 'seriously adversely reflect' this particular respondent's fitness to practice." *Id* at p 8. So too, here. The specific incident which resulted in the charges against the Respondent do not reflect a lack of fitness to practice law because it was so minor, abbreviated, was not directed at clients, did not produce injury and was the product of a momentary loss of control as a result of what a Wayne County Circuit Court Judge found to be inappropriate conduct on behalf of Attorney Paterra. Furthermore, the record fails to indicate any similar conduct by Respondent throughout his otherwise distinguished career. Nothing approaching the violent severity of the attack in *Fink* occurred in this case. As the ADB noted in *Fink*,

> Any rule which would simplistically characterize conduct by labels (e.g. "assault"), and then allow that characterization to dictate the level of discipline to be imposed irrespective of factual distinctions, will promote barren records and decisions on discipline without all relevant facts. This is ultimately harmful to the public, the courts, and the bar. For only when a panel, this Board and/or the Court have a full and true picture of the nature of the misconduct can the appropriate level of discipline be assigned. *Fink, supra* at p 13.

This Panel had the opportunity to hear the testimony, observe the witnesses and place the facts in complete context. After having done so, our ROM found that Attorney Paterra's testimony regarding the incident "simply was not credible as to what took place (as well as a number of other points)." ROM, p 4. In fact, this Panel did not believe

there was any real violence or threat associated with the momentary touching of Attorney Paterra's tie.

I am cognizant of the decisions in *Grievance Administrator v Lakin*, 96 116 GA (ADB 1997) and *Grievance Administrator v Krupp*, 94-178-GA (ADB 1995). Both of those cases are distinguishable, however, because of the nature and extent of the violent physical acts involved. In *Lakin*, the respondent struck opposing counsel causing his glasses to fall to the floor and then later exacerbated the incident by pushing his forefinger into opposing counsels' forehead. In *Krupp*, the respondent used profanity directed at opposing counsel, threw a pen at him while swearing at him and threatened him with physical violence saying that he would "kick [his] ass". In those cases a reprimand was deemed appropriate.

Similarly, in *Grievance Administrator v Thick*, DP-147/83 (ADB 1984), the respondent pled guilty to a misdemeanor assault after having taken a pistol from his desk drawer and brandishing it during an argument which took place between a divorcing couple. When the husband attempted to leave the respondent's office with some documents, the respondent blocked the husband's way out of the office and a fight ensued that resulted in the respondent and the husband rolling down a flight of stairs. The respondent was reprimanded.

In *Grievance Administrator v Novek*, 91-135-GA (ADB, 1992), a reprimand was deemed appropriate when the respondent engaged in rude, condescending and discourteous behavior towards a witness during a deposition. The witness then physically pushed the respondent during a break in the deposition. Nothing even approaching such behavior occurred in this case.

IV. CONCLUSION

Our ROM clearly evidences the Panel's conclusion that Respondent engaged in professional misconduct. Our task at this point is to assess what sanction, if any, is appropriate. The Grievance Administrator has requested that we impose a reprimand and relies upon *Grievance Administrator v Eston*, DP 48/45 (ADB 1987) and *Musilli*, *supra*. Each of those cases is distinguishable, *Eston* because of the threats and intimidation involved and *Musilli* because it had nothing to do with violence. The Respondent suggests that no discipline is warranted. Having had an opportunity to listen to the witnesses, fully sift through the facts and probe the witnesses where members of this Panel felt it necessary, we concluded that Attorney Paterra's testimony concerning what transpired was not completely credible. To his credit, the Respondent acknowledged what he did, described it much more accurately than Attorney Paterra, and he apologized to Attorney Paterra within moments of the incident.

Considering the precedent we are required to follow, as well as applying the ABA Standards and "notions of justice and fairness", *Deutch* at 163, I conclude that the Respondent's one-time touching of Attorney Paterra's tie without pulling or jerking it violently, and then releasing it, does not come anywhere close to the conduct found to warrant a reprimand in *Golden, Fink, Lakin, Krupp, Thick* and *Novek*. Accordingly, while I in no way approve of Respondent's conduct and agree with the admonition in *Golden* that "lawyers can expect that conduct rising to the level of a physical assault while performing their legal duties will generally result in a suspension", *Golden* clearly indicates that a suspension will not be warranted "whenever an attorney touches another person involved in the legal process." *Golden, supra* p 5.

Applying the common sense principles of "progressive discipline, proportionality, and careful inquiry into the facts", *Fink, supra* at 19, and the applicable mitigating factors in ABA Standard 9.32, e.g. no dishonest or selfish motive, timely good faith effort to rectify the consequences of the misconduct, full and free disclosure to the Grievance Commission and a cooperative attitude toward the proceedings, a reputation for always behaving in a civil and professional manner sometimes even in the face of being bated by opposing counsel, a sincere sense of remorse, no prior similar acts of misconduct and the lack of any violence in this case, I conclude this is one of those rare cases where no discipline is necessary to "protect the public, the court or the profession." MCR 9.105. Accordingly, I dissent from the decision to reprimand the Respondent.

ATTORNEY DISCIPLINE BOARD
Tri-County Hearing Panel #25

By:_____
Howard I. Wallach, Member