STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellee-Cross Appellant,

v

David H. Raaflaub, P 29975,

Respondent/Appellant-Cross Appellee,

Case No. 01-94-GA

Decided: June 16, 2003

Appearances:
H. Lloyd Nearing, for the Grievance Administrator.
David H. Raaflaub, In pro per

BOARD OPINION

The respondent and the Grievance Administrator both petitioned for review of a hearing panel order suspending the respondent's license to practice law in Michigan for a period of 180 days. The Attorney Discipline Board has conducted review proceedings in accordance with MCR 9.118. We conclude that the findings of fact and conclusions of law expressed in the master's report entered April 9, 2002, and the hearing panel's report entered June 28, 2002, have ample evidentiary support in the record. We therefore affirm the panel's finding that the respondent signed and caused to be filed in the Michigan Court of Appeals a motion for rehearing which contained false statements about a circuit court judge and an assistant prosecutor in Jackson County Michigan which respondent knew to be false or were made with reckless disregard as to their truth or falsity, in violation of Michigan Rule of Professional Conduct 8.2(a). The Board has considered the respondent's procedural and constitutional challenges to the proceedings below, the Michigan Rules of Professional Conduct and Michigan's discipline system in general. We conclude that respondent's challenges are without merit. The Board has also considered the Grievance Administrator's argument that the discipline imposed by the hearing panel was insufficient. For the reasons

discussed below, we increase discipline in this case from a suspension of 180 days to a suspension of one year.

I. Hearing Panel Proceedings

The Grievance Administrator's formal complaint against the respondent, David H. Raaflaub, filed July 10, 2001, is based exclusively upon a motion for rehearing signed and filed by the respondent in the Michigan Court of Appeals in March 2000 in a criminal proceeding entitled People v David Allen Walker, Jackson County Circuit Court No. 97-081140-FC. The motion (which is attached to this opinion as Appendix A) contains a variety of allegations of improper or illegal conduct by various individuals including a Jackson County Circuit Court judge, an assistant prosecutor in Jackson County, the Jackson County Court Clerk and others. The assertions in the respondent's motion included his claims that:

A. The assistant prosecutor conducted a racketeering enterprise under which he abused his lawful powers of office to extort money for personal financial gain;

B. The assistant prosecutor conspired with a reserve police officer to conceal exculpatory evidence;

C. The assistant prosecutor conspired with the trial judge and the court clerk to remove testimony from the trial transcript;

D. The assistant prosecutor conspired with the Jackson County Clerk to supply her with illegal drugs and cash;

E. The assistant prosecutor conspired with a police officer to fabricate a story of how exculpatory evidence was allegedly misplaced;

F. The assistant prosecutor conspired with an individual known as "Judy" to impersonate the complaining witness in the underlying criminal case, to provide false testimony and "to provide sexual favors for the trial judge, in return for payments of cocaine and cash";

G. The assistant prosecutor conspired with the court clerk and another individual to pay bribes to members of the jury in return for a vote to convict the defendant;

H. The assistant prosecutor conspired with the court clerk and others to pay bribes to the trial judge in the criminal proceeding.

I. The assistant prosecutor conspired with a reserve police officer and others to extort money (in excess of three million dollars) from Target Stores, Inc.;

J. The assistant prosecutor and others conspired with a sex-offender counselor to extort additional funds from Target Stores, Inc.;

K. The assistant prosecutor and others instructed a sex-offender counselor to obtain a false confession in writing from the defendant in the underlying criminal matter, "after which false confession, defendant was to be murdered to protect the conspirators from discovery."

The complaint was assigned to Tri-County Hearing Panel #1 for proceedings in accordance with MCR 9.115. Subsequently, the Board determined on its own motion that the appointment of a master pursuant to MCR 9.110(E)(3) and MCR 9.117 would be appropriate. The Board's order appointing Master Miles A. Hurwitz was issued October 3, 2001. Master Hurwitz conducted pre-trial proceedings in November 2001 and January 2002 followed by evidentiary hearings before the Master on February 18 and February 19, 2002. The Master's report was filed April 9, 2002.[1] In accordance with MCR 9.117, the parties were given 14 days to file written objections to the Master's report.

The hearing panel filed its decision on June 28, 2002, setting forth the panel's unanimous conclusion that the Master's findings of fact and conclusions of law were supported by the record. The panel then conducted a separate hearing on discipline in August 2002 and issued its final report and order on September 26, 2002.[2] While the panel found that there was not sufficient evidence of an intent to deceive the Court of Appeals, and therefore an insufficient basis for application of Standard 6.11 of the ABA Standards for Imposing Lawyer Sanctions, the panel did find that the respondent's reckless disregard as to the truth or falsity of his statements warranted the suspension

---

[1] The Master's report is attached as Appendix B.

[2] The hearing panel's report on discipline is attached as Appendix C.

of the respondent's license. The panel specifically found that a suspension of sufficient length to require reinstatement proceedings was appropriate. The panel ordered a suspension of the respondent's license for 180 days, the minimum period required under MCR 9.123 to trigger reinstatement proceedings before a hearing panel.

II. Evidentiary Support for Findings Below.

Michigan Rule of Professional Conduct 8.2(a) directs that:

> A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicative officer, or public legal officer, or of a candidate for election or appointment to judicial or legal office.

In support of the charge in the formal complaint that the statements in the respondent's pleading were false, the Grievance Administrator presented the testimony of Jackson County Circuit Judge Edward J. Grant, assistant prosecutor Wade Muchler and the victim in the underlying criminal matter, Heather McLeod. Their testimony, which is discussed in the Master's Report (Appendix B), provides ample evidentiary support for the conclusion that there was no conspiracy to conceal evidence in the matter of People v David Allen Walker; that no one impersonated the victim, Heather McLeod in court; that there were no bribes to the judge; and that there was no conspiracy to provide sexual favors to a trial judge in return for payments of cocaine and cash. For his part, the respondent, who was not personally involved in the underlying criminal trial, testified on his own behalf and presented the testimony of Joe D. Walker, the father of the criminal defendant, David Walker, as well as Robert W. Schubring, a self-described "research and development" consultant and guiding force behind a group called "Citizens Against Police and Prosecutorial Corruption." To the extent that the Master was presented with conflicting testimony, it was within the Master's province to make credibility determinations based upon his unique opportunity to observe demeanor, and other factors, at first hand. The credibility of the witnesses and the weight to attach to each person's testimony is for the panel to determine. Matter of Daggs, 411 Mich 304, 314; 307 NW2d 66 (1981). On review, it is not the Board's responsibility to substitute its judgment for that of the Master or the hearing panel below but to determine whether, in the whole record, there is proper

evidentiary support for the findings below. State Bar Grievance Administrator v Del Rio, 407 Mich 336, 349; 285 NW 2d 277 (1979).

Applying that standard of review to the record in this case, it is clear that the findings adopted by the hearing panel are well supported. Indeed, we must express our agreement with the characterization by Assistant Prosecutor Muchler that the conspiracy theories and allegations of criminal conduct in the pleading filed by the respondent in the Michigan Court of Appeals "have no basis in reality whatsoever and are utterly false." (Tr at p 143.)

Respondent raises some 48 separately enumerated claims of error with respect to the Master's report. As noted above, we conclude that there was ample evidence to support the findings made below. We further conclude that respondent's claims of legal error are without merit.

III. Constitutional, Statutory, Public Policy & Other Claims.

Respondent argues, correctly, that this Board has interpreted MRPC 8.2(a)'s "reckless disregard" language in a manner consistent with New York Times v Sullivan, 376 US 254; 84 S Ct 710; 11 L Ed 2d 686 (1964). See, e.g., Grievance Administrator v Geoffrey N. Fieger, No. 94-186-GA (ADB 2002), p 2 n 1. And, as respondent acknowledges, this Board has also recognized that the Michigan Supreme Court has interpreted MRPC 8.2(a) differently. Id. pp 2-3. Specifically, in a judicial misconduct case involving a similar rule, the Court "reject[ed] as inappropriate" the subjective "actual malice" standard employed by New York Times and its progeny. In Re Chmura, 461 Mich 517; 608 NW2d 31 (2000). See also, Fieger, supra, pp 2-3. Respondent now contends that the United States Supreme Court will not approve the Michigan Supreme Court's adoption of the "objective standard" for "reckless disregard." Of course, we are bound by our Court's pronouncements as to the appropriate legal standard. We hasten to add that our Court was aware of the core First Amendment principles that respondent now claims shield him from the consequences of his misconduct in this matter. Indeed, the Michigan Supreme Court recognized that:

> "erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive,'" New York Times Co v Sullivan, 376 US 254, 271-272, 84 S Ct 710, 721; 11 L Ed 2d 686 (1964), quoting NAACP v Button, 371 US 415, 433; 83 S Ct 328, 338; 9 L. Ed. 2d 405 (1963). [Chmura, 461 Mich at 536.]

Our Court has plainly articulated the applicable standard and determined its constitutionality. That ends the inquiry. However, we note that respondent's accusations are so disturbingly fantastic and unsupported that one might even be able to infer actual malice from this record.

Among his many claims, respondent also contends that his status as an "officer of the court" somehow invokes Michigan's Whistleblower Statute:

> Case law in Michigan respecting wrongful discharge provide [sic] a basis of recovery pursuant to the Whistleblower's Statute but also [sic] an independent public policy against retaliation for the reporting of suspected wrongdoing.
>
> The Master has asserted that respondent below is an officer of the court. Accepting that characterization, for the sake of argument, this implies some type of employment by the court. If then, respondent is disciplined in retaliation for a complaint about the court's functioning, the case falls squarely under the authority of the employment doctrine making it unlawful for dismissal from employment in retaliation for a complaint of court actions. [Respondent's 11/27/02 brief in support of petition for review, p 12.]

Still another of respondent's arguments on appeal invokes the Americans with Disabilities Act on the grounds that the judge and prosecutor in Jackson County owed a duty of "reasonable accommodation" to their accusers if, as they implied, they viewed the accusations as coming from persons with mental disability. [Respondent 11/27/02 brief in support of petition for review, p 8.]

The Attorney Discipline Board has considered the respondent's various claims and the concise refutation of those claims in the reply brief submitted by the Grievance Administrator. We conclude that the respondent's claims that the discipline proceedings against him in this case violate the First Amendment, other state and federal constitutional provisions, and various state and federal statutes are without merit.

IV. Level of Discipline.

Based upon the totality of the proceedings, including both the record below and the review proceedings before the Board in accordance with MCR 9.118, we conclude that increased discipline is necessary to protect the public, the courts and the legal profession.

At the hearing on discipline conducted before the hearing panel in August 2002, the Grievance Administrator's counsel suggested that discipline in this case should be imposed under ABA Standard 6.12 which states:

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

As for the appropriate length of the suspension, the Administrator's counsel argued to the panel:

> . . . and my view is that the level of discipline here is anywhere from minimum - bare minimum, something requiring [reinstatement] to something requiring a re-certification. It is somewhere in between there. I will be arguing that it should be re-certification. [Tr 8/8/02, p 9.]

The hearing panel adopted the Grievance Administrator's analysis as to the applicability of ABA Standard 6.12. The 180 day suspension ordered by the hearing panel was, in fact, the "bare minimum" requested by the Administrator, that is, a suspension of sufficient length to trigger the reinstatement requirements of MCR 9.123(B) and MCR 9.124. Therefore, we are not prepared to adopt the Grievance Administrator's argument on review that the hearing panel "erred" in its decision to impose a six month suspension. At the same time, however, it is well established that "While the Board affords a certain level of deference to a hearing panel's subjective judgement on the level of discipline, the Board possess, of necessity, a relatively high measure of discretion with regard to the appropriate level of discipline." Grievance Administrator v James H. Ebel, 94-5-GA (ADB 1995) citing Grievance Administrator v August, 438 Mich 296-304 (1991); Matter of Daggs, 411 Mich 304, 319 (1981).

A review of relevant authorities in Michigan discloses four cases which bear some similarity to the case now before us. Of particular interest is Grievance Administrator v Walter O. Estes, 355 Mich 411 (1959), in which the Supreme Court affirmed a one year suspension for an attorney who charged in a brief that the trial judge illegally collaborated with the prevailing party. In a much older case, In re Mains, 121 Mich 603 (1899), an attorney who was himself a defendant in a perjury trial, was disbarred after charging the trial judge with bribery and conspiracy. We also note two prior Board cases including Grievance Administrator v James A. Lepley, 21-87 (ADB 1991), in which the

Board affirmed, without opinion, a suspension for 120 days (at that time, the length of suspension which required reinstatement proceedings) in a case involving an attorney's false statement in a request for investigation that two other attorneys had offered perjured testimony in a discipline proceeding. Finally, in Grievance Administrator v William Ortman, 93-135-GA (ADB 1995), the Board reduced discipline from a disbarment to a suspension of three years where the attorney filed a series of pleadings on behalf of himself or his family owned company which were deemed to be "false, scandalous and spurious" in their allegations against judges and attorneys.

It is axiomatic that comparisons to other cases are of limited value and that the appropriate level of discipline in each case must depend on the unique factors presented. Matter of Grimes, 414 Mich 483 (1982). Nevertheless, the cases cited above do suggest that, in general, unfounded accusations of the type and seriousness demonstrated here may result in an attorney's suspension for a period longer than the minimum necessary to trigger the reinstatement process described in MCR 9.124.

Arguably, the Grievance Administrator could have charged the respondent with a violation of MRPC 3.1 which directs, in part, that "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous." Nevertheless, the Administrator's reliance on MRPC 8.2(a) which prohibits a lawyer from making a statement "that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicative officer, or public legal officer . . ." does not preclude us from considering, as an aggravating factor, that the respondent's statements were in writing, were signed by him, and were contained in a demonstrably frivolous pleading in the Court of Appeals.

Rules proscribing frivolous contentions advance the rule of law, in part, by protecting the resources society has allocated to dispute resolution from being squandered. Here, respondent signed a pleading without bothering to marshal anything resembling that which a reasonable person would consider evidentiary support. Unfortunately, respondent does not appear to have learned much from these proceedings and his brief on review is filled with legal and factual contentions which, themselves, border on the frivolous.[3]

---

[3] In addition to the previously mentioned argument under the Americans with Disabilities Act, we include in this category the respondent's arguments that the discipline order is an excessive fine prohibited by the Eighth

We conclude that respondent's failure to inquire into the facts or to support his allegations in a motion for rehearing filed with the Court of Appeals raises serious questions about his fitness to practice law. Judges and prosecutors will withstand baseless allegations such as these. But, if, as respondent seems to believe, the duty of zealous advocacy gives lawyers free rein to tie up judicial resources with baseless claims, the public's business before the courts will grind to a halt and public confidence in both the legal profession and the judiciary will be eroded.

Having concluded that a suspension of the respondent's license to practice law is appropriate under ABA Standard 6.12, and having considered the entirety of the record before us, we conclude that discipline in this case should be increased from a suspension of six months to a suspension of one year. Under the rules governing reinstatement, the respondent's right to engage in the practice of law in Michigan will not be automatically restored at the end of that period nor does the mere passage of time specified in such a discipline order raise a presumption that the disciplined attorney is entitled to reinstatement. See In re reinstatement of James Del Rio, DP 94/86 (ADB 1987). Rather, the one year suspension period ordered in this case defines the minimum period before the respondent may appear before a hearing panel in reinstatement proceedings to demonstrate his "ability, willingness and commitment to conform to the standards required of members of the Michigan State Bar." Grievance Administrator v August, 438 Mich 296, 310; 475 NW2d 256 (1991).

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

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

Amendment to the Constitution of the United States [Respondent's argument MM]; that the order violates Article One, Section Ten of the Constitution in that it interferes with respondent's contracts with his clients [Respondent's argument NN]; and the wholly unsupported claim that the master appointed to hear this case by the Board was somehow biased in favor of the Grievance Administrator because of the presence of an unspecified "pecuniary thread." [Respondent's argument hh.]

STATE OF MICHIGAN

IN THE COURT OF APPEALS

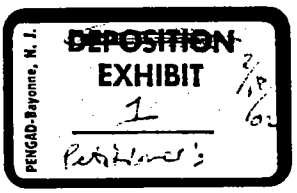
PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

Nos. 208097,216240
Jackson Circuit Court
LC No 97-081140-FC

Vs.

DAVID ALLEN WALKER,
Defendant-Appellant
_____/

Jackson County Prosecutor's Office
Attorney for Plaintiff-Appellee,
_____/



DAVID H. RAAFLAUB (P29975).
Attorney for Defendant-Appellant.
400 West Washington St., Ste. 700
Ann Arbor, Michigan 48103
(734)769-2645
_____/

Robert W. Schubring, Vice-President,
Citizens Against Police and Prosecutorial Corruption, Inc.
Amicus Curiae
2723 Avonhurst Drive
Troy, Michigan 48084
(248)647-1916

Motion for Rehearing

Defendant-Appellant moves for rehearing of the decision dated March 7, 2000, for the following reasons..

I. This motion is made under MCR 7.215(g) and pursuant to the files and records in this case, the transcript below, the video tapes of the proceedings and the affidavit of Joe Walker in support of motion for rehearing.

II. A copy of the opinion of which rehearing is sought, is attached hereto.

3. Pursuant to MCR 2.119(F)(3). there exists a palpable error by which the court and the parties have been misled, the correction of which error must result in a different

APPENDIX A

disposition.

I. Prosecutorial Misconduct

A. Defendant was videotaped by security cameras, inside the Target store at the Jackson Crossing Mall, at the exact time that a Target employee, who identified herself as "Heather Rene McLeod", claimed she was robbed at knifepoint by an assailant, who robbed her in her car, which was parked outside in a busy parking lot. Defendant's alibi was thereby established.

B. Assistant Prosecutor Wade Norman Mutchler was aware of the proof of Defendant's alibi, but brought charges unlawfully.

1. Assistant Prosecutor Wade Norman Mutchler, together with others, conducted a racketeering enterprise as defined under 18 USC 1961 et seq., under which they abused their lawful powers of office to extort money for personal financial gain.(1)
2. Assistant Prosecutor Mutchler conspired with Reserve P.O. Mike Brandt, who was the Target store security director, to remove from court and conceal the videotape which proved Defendant's alibi, thereby denying Defendant the use of exculpatory evidence. Their actions were recorded on official courtroom videotape (2), and observed by Detective Gail Rogers, who swore that Reserve P.O. Mike Brandt was the last person seen with the exculpatory videotape. The testimony of Cheryl Strzyzewski, a civilian JPD employee, and official evidence room logs also reflect that BOTH evidence videos had been returned to Target Stores in April following the first trial(3).
3. Assistant Prosecutor Mutchler conspired with the Trial Judge and Court Clerk to remove Det. Rogers' testimony about the evidence theft, in which he had participated, from the trial transcript(4). Four pages of Det. Rogers' testimony were not transcribed and were withheld from the Michigan Court of Appeals(5). Other critical testimony was unlawfully withheld from the Michigan Court of Appeals by tampering with the trial

transcript(6).

4. Assistant Prosecutor Mutchler conspired with the Court Clerk, to supply her with illegal drugs and cash(7).

5. Assistant Prosecutor Mutchler conspired with P.O. Gary Schuette to fabricate a story of how the exculpatory evidence videotape was misplaced and lost through supposed negligence(8).

6. Assistant Prosecutor Mutchler conspired with Jane Doe No. 1, known by name only as "Judy", to impersonate Heather R. McLeod in court, to make false testimony about the alleged robbery, and to provide sexual favors for the trial judge, in return for payments of cocaine and cash(9).

7. Assistant Prosecutor Mutchler conspired with the Court Clerk and with John Doe No. 1, an employee of Target Stores, Inc. to pay bribes to members of the jury in return for a vote to convict the Defendant(10).

8. Assistant Prosecutor Mutchler conspired with the Court Clerk and with John Doe No. 1, an employee of Target, Inc. to pay bribes to the Trial Judge in return for favorable rulings during the proceedings, so as to convict the Defendant(11).

9. Assistant Prosecutor Mutchler conspired with Reserve P.O. Mike Brandt and others to extort money totaling in excess of three million dollars, from Target Stores, Inc., by threatening to rediscover the exculpatory videotape evidence, exonerate the Defendant, charge Jane Doe No. 1 with perjury, and charge officials of Target, Inc., with bribery, thereby exposing Target, Inc. to a civil suit for damages by Defendant, which damages were perceived by John Doe No. 1 to total over $ 500 million, based upon previous jury verdicts in civil rights cases(12), and which civil suit would bring irreparable damage to Target, Inc.'s corporate reputation.

10. Assistant Prosecutor Mutchler and others conspired with sex-offender counselor Greg Bengry to extort additional funds from Target, Inc., on a continuing basis, using the vehicle

of a directed verdict of guilty but mentally ill (hereinafter "GBMI"), which would require rehearings into Defendant's mental condition every six months, at which rehearings Target, Inc., would again be threatened with exposure of its role, and further blackmail payments required, to keep Defendant under supervision by Bengry(13).

11. When the State Appellate Defender's Office (hereinafter "SADO") issued a bulletin(14), seeking new GBMI cases with which to challenge the constitutionality of Michigan's GBMI process, trial proceedings were interrupted by the trial court(15), to enable Assistant Prosecutor Mutchler and others to study the potential consequences of SADO involvement in this case(16).

12. Upon evaluation of the risks posed by a SADO appeal of the intended verdict of GBMI, Assistant Prosecutor Mutchler and others chose to abandon plans for a GBMI verdict, and instructed Bengry to direct his efforts at obtaining a false confession in writing from Defendant, after which false confession, Defendant was to be murdered to protect the conspirators from discovery(17).

13. Assistant Prosecutor Mutchler allowed Greg Bengry a month to obtain the desired false confession(18). When Bengry failed to obtain one, he falsely charged Defendant with violating his probation(19), and the trial court ordered Defendant imprisoned. *Greg Bengry apologized directly to the Trial Judge in open court at the probation violation hearing for his failure to obtain a confession*(20).

14. Defendant took and passed a polygraph exam by retired MSP chief examiner. This polygraph exam was ignored by the prosecutor, who refiled charges and continued with the malicious prosecution and extortion plan against Target.

II. Ineffective Representation by Trial Counsel.

Defendant sought multiple times to be represented by counsel during police questioning. Police repeatedly refused to allow him to be represented by counsel during questioning. P.O. Schuette admitted on the record that Defendant sought counsel, and tacitly acknowledged the

mandate that all police questioning must cease, until a defendant is provided with counsel(21).

A. P.O. Gary Schuette disobeyed the Defendant's right to counsel, and continued badgering Defendant. P.O. Schuette falsely stated, "He cannot have an attorney until we get into court". P.O. Schuette and others falsely arrested Defendant's father, a diabetic, by telling him that he could not leave the station until questioning was completed(22). P.O. Schuette committed perjury, by falsely testifying to the trial court that Defendant waived his right to counsel(21).

B. P.O. Gary Schuette made contradictory statements about there having been a confession. Owing to ineffectiveness of trial counsel, it was not noted March 24th at a Walker hearing that the police had a camera in place to videotape the interrogation, which would have disproven P.O. Schuette's claim that a confession was made (22). Officer Gary Schuette testified that defendant Walker made a loud outburst, admitting guilt, within range of a police station video camera. Yet Officer Gary Schuette also testified that this very loud outburst was not audible on the police station's videotape. These statements under oath are in direct contradiction to each other(23). Officer Gary Schuette's own records indicate the interrogation lasted until 10-15 minutes before the 1:13 time noted on the Miranda form. Yet Officer Schuette testified that the form should read "11:30" or about 1.5 hours shorter than the officer's own records indicated(24). Officer Gary Schuette testified at the retrial that he had concerns about the mental state of defendant David A. Walker during questioning. This is in direct contradiction to his prior testimony in the Walker hearing, which sought the unwitnessed, unrecorded, and unsigned "confession" of defendant David A. Walker to be(25) admitted into evidence. Officer Gary Schuette displayed a continuing pattern of changing his testimony, depending upon the effect desired. At the present trial, trial counsel made a motion(26) to introduce videotaped testimony from the Walker hearing, and the April mistrial, into evidence. The motion was denied. At the present trial, P.O. Schuette did not admit to

the existence of a videotaped record of the interrogation.

C. Defendant was abused psychologically by P.O. Schuette, and required hospitalization at U of M (Ann Arbor) later that day, for one week, before he was charged(27). Defendant was incompetent to make a knowing confession owing to his mental state, which defense should have been raised in the absence of the videotape of the interrogation, and the absence of the previous contradictory testimony of P.O. Schuette. Trial counsel failed to raise the issue of Defendant's mental state or hospitalization which resulted from abuse inflicted upon the defendant by P.O. Schuette.

D. Due to ineffectiveness of trial counsel, a motion for habeas corpus was made, but not enforced by the trial court(28), to present to the jury the person most likely to have assaulted Heather McLeod in the parking lot, to wit, Darren Kevin Blodgett, who perpetrated a series of robberies in parking lots and was arrested January 26th, 1997, while Defendant was home recuperating after his hospitalization. Mr. Blodgett resembled Defendant David Walker, and his height and weight more nearly matched the description provided by Heather McLeod, than did Defendant Walker(29).

E. Due to ineffectiveness of counsel, no objection was made to the composition of the jury panel, which

1. contained persons who were not properly identified(30) during *voir dire,*
2. contained persons who were acquainted with police officers and prosecution witnesses, and:
3. that half the jurors impaneled were known personally to Det. Rogers(31),
4. that the trial judge, owing to bias, instructed members of the jury pool that they

may "not want to dutifully recognize" prosecution witnesses(32).

III Inadequacy of Appellate Counsel

A. Due to ineffectiveness of appellate counsel, the Court of Appeals was misled, because no reference to the trial record was made, which provides evidence that the police and prosecution acted in bad faith, in that the judge, police, prosecutor, and employees of Target, conspired to conceal the store tapes, which proved defendant's alibi, i.e., that he was inside the store at the time of the alleged offense in the parking lot.

B. Due to ineffectiveness of appellate counsel, it was not brought out that "Judy" appeared as an imposter, to impersonate Heather McLeod, was paid for her services in crack cocaine and cash, and was made available to the judge, the assistant prosecutor, and the police, for sexual favors.

C. Due to ineffectiveness of appellate counsel, it was not brought out that the trial judge clearly stated a prejudicial belief that Defendant was guilty(33), and therefore had every reason to rule in a biased fashion, apart from any consideration of personal financial gain.

Facts:

David Walker was determined to be telling the truth when he denied assaulting Heather McLeod. See Motion for Brady Hearing dated September 27, 1997.

Darren Kevin Blodgett was arrested January 26, 1997 and found guilty of multiple parking lot attacks involving other downtown parking lots. Defense was prevented from bringing him to trial from a State Prison to show that he was the most likely suspect for the attack on Heather McLeod. A writ of habeas corpus was ignored, thereby denying defense counsel the right to show someone else likely committed the attack on Heather McLeod. Mr. Blodgett fits the victim's description better than the defendant does, and he resembles the facial features of the defendant.

Court videotapes show sidebar conversations in which the Judge and Prosecutor discuss payoffs to themselves to blackmail Target and fix this case.

None of defendant's attorneys placed Joe Walker on the stand to testify that he had requested an attorney during police interrogation of his son.

Citations

Note on Citations: In the interest of justice, Citizens Against Police and Prosecutorial Corruption, Inc., a nonprofit Michigan private operating foundation, has established space on its Internet website, to provide any and all members of the public with information on this case. Citations listed below as "See CAPPC Website" refer to links on the electronic version of this Motion, which will become operational at or before midnight, March 30, 2000. These Website links include still and full-motion video, and audio recordings, excerpted from official courtroom videotape, that demonstrate the performance of criminal acts by co-conspirators, who abused their powers of office to operate a racketeering enterprise within the Jackson County Courthouse. The original courtroom videotape, taken during the trial, is secured in custody in bank safe deposit vaults. Official copies are also kept at the Jackson County Courthouse, and are available as public records.

1. (See CAPPC website). http://www.cappc.org/briefs/walker.html
2. (See CAPPC website).
3. Strzyzewski: Trial transcript, p. 459. Rogers: Trial Transcript, pp. 549-552 and CAPPC website.
4. (See CAPPC website).
5. Trial transcript, pp. 549-552 is reconstructed on CAPPC website.
6. (See CAPPC website).
7. (See CAPPC website).
8. P.O. Schuette's version of events is at Evidentiary Hearing transcript, pp. 69-72.
9. (See CAPPC website).
10. (See CAPPC website).
11. (See CAPPC website).
12. (See CAPPC website).
13. (See CAPPC website).
14. (See CAPPC website).
15. Trial transcript, pp. 883-884, reveals a postponement of deliberations, owing to an unspecified emergency involving juror Carol Neville. This corresponds with (14) and (16).
16. (See CAPPC website).
17. (See CAPPC website).
18. (See CAPPC website).
19. (See CAPPC website).
20. (See CAPPC website).
21. Walker Hearing transcript, pp. 30-31.
22. Trial transcript p. 697, lines 10 - 22. See also attached "Certificate of Joe Walker".
23. Trial transcript p. 419, contradicted by transcript of 97-78822FC (4-15-97), p. 92.
24. Walker Hearing transcript pp. 16-17.
25. Compare Walker Hearing transcript, p. 35, line 21-24, with Trial transcript, pp. 435-437.
26. Motion for Brady Hearing, File No. 97-81140-FC, dated September 27, 1997.
27. (See CAPPC website).
28. Trial transcript, p. 665 line 23 - p. 666, line 20.
29. (See CAPPC website).
30. Trial transcript, p. 79.
31. (See CAPPC website).
32. Trial transcript, p. 85, line 20-22. Please compare with CAPPC website.
33. Evidentiary Hearing transcript, p. 14, lines 1-4.

We petition the Court to reverse the conviction of David Allen Walker for felonious assault.

DAVID H. RAAFLAUB (P29975)
400 West Washington St., Ste. 700
Ann Arbor, Michigan 48103
734-769-2645

STATE OF MICHIGAN
IN THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

Vs.

DAVID ALLEN WALKER,
Defendant-Appellant
_____/

Nos. 208097,216240
Jackson Circuit Court
LC No 97-081140-FC

Jackson County Prosecutor's Office.
Attorney for Plaintiff-Appellee,

David H. Raaflaub (P29975)
Attorney for Defendant-Appellant
400 West Washington St., Ste. 700
Ann Arbor, Michigan 48103
734-769-2645
_____/

CERTIFICATE OF JOE WALKER IN SUPPORT OF MOTION FOR REHEARING

I, Joe Walker, do certify under penalty of perjury that the following statements are true:

1. I am the father of the defendant.
2. I was present at the Jackson Police station on January 13, 1997, when my son was questioned by the police.
3. I requested multiple times to have an attorney present.
4. I asked how an attorney would be provided, and was told an attorney would not be provided then but when we went to court but could "not have one at this time." I advised all of my son's attorneys of my requests for an attorney during interrogation.
5. Officer Gary A. Schuette tacitly acknowledged my requests for an attorney when he testified at the Walker hearing, 03-24-97 at page 10: "Mr. Walker advised me that he didn't have much money and how an attorney would be appointed for him. I told him that the courts would provide an attorney for him." Officer Schuette was saying an attorney would not be appointed until later, which misrepresented the right to counsel.
6. At no time was David or me called in any proceeding to testify that I had requested an attorney to be present during David's questioning by the police.
7. Despite my requests for an attorney, the police continued to question David.
8. Although a video camera was set up in the room plugged in and aimed at the interrogation area. Police officers deny the existence of any recording from this video camera or any other recording audio or video of David's interrogation.
9. No notes were made or was a statement requested to be in writing.

I do not say anything further.

Joe David Walker

STATE OF MICHIGAN

ATTORNEY DISCIPLINE BOARD

02 APR -9 AM 9:32

Grievance Administrator,
Attorney Grievance Commission,
State of Michigan,

Petitioner,

v ADB Case# 01-94-GA

David H. Raaflaub, P-29975

Respondent.
_____/

MASTER'S REPORT

I. PROCEEDINGS

A one count Formal Complaint filed on July 10, 2001 charged Respondent with causing a Motion for Rehearing to be filed in the Michigan Court of Appeals without reasonable inquiry to determine if certain statements were well grounded in fact. Respondent is also charged with making false statements about Circuit Court Judge Edward J. Grant and Assistant Prosecutor Wade N. Mutchler, which statements he either knew were false, or he made them with reckless disregard as to their truth or falsity. The statements are contained in paragraphs 7 (a) - (n) of the Formal Complaint and P Exh 1 Paras I.B.1-14. The Master heard testimony from trial Judge Edward Grant, Assistant Prosecutor Wade Mutchler, assault victim, Heather McLeod, Respondent, David Raaflaub, Robert W. Schubring, and the criminal defendant's father, Joe D. Walker.

APPENDIX B

The statements at issue from P Exh 1,I.B., Motion for Rehearing, follow:

1. Assistant Prosecutor Wade Norman Mutchler, together with others, conducted a racketeering enterprise as defined under 18 USC 1961 et seq., under which they abused their lawful powers of office to extort money for personal financial gain.

2. Assistant Prosecutor Mutchler conspired with Reserve P.O. Mike Brandt, who was the Target store security director, to remove from court and conceal the videotape which proved Defendant's alibi, thereby denying Defendant the use of exculpatory evidence. Their actions were recorded on official courtroom videotape and observed by Detective Gail Rogers, who swore that Reserve P.O. Mike Brandt was the last person seen with the exculpatory videotape. The testimony of Cheryl Strzyzewski, a civilian JPD employee, and official evidence room logs also reflect that BOTH evidence videos had been returned to Target Stores in April following the first trial.

3. Assistant Prosecutor Mutchler conspired with the Trial Judge and Court Clerk to remove Det. Rogers' testimony about the evidence theft, in which he had participated, from the trial transcript. Four pages of Det. Rogers' testimony were not transcribed and were withheld from the Michigan Court of Appeals. Other critical testimony was unlawfully withheld from the Michigan Court of Appeals by tampering with the trial transcript.

4. Assistant Prosecutor Mutchler conspired with the Court Clerk, to supply her with illegal drugs and cash.

5. Assistant Prosecutor Mutchler conspired with P.O. Gary Schuette to fabricate a story of how the exculpatory evidence videotape was misplaced and lost through supposed negligence.

6. Assistant Prosecutor Mutchler conspired with Jane Doe No. 1, known by name only as "Judy", to impersonate Heather R. McLeod in court, to make false testimony about the alleged robbery, and to provide sexual favors for the trial judge, in return for payments of cocaine and cash.

7. Assistant Prosecutor Mutchler conspired with the Court Clerk and with John Doe No. 1, an employee of Target Stores, Inc. to pay bribes to members of the jury in return for a vote to convict the Defendant.

8. Assistant Prosecutor Mutchler conspired with the Court Clerk and with John Doe No. 1, an employee of Target, Inc. to pay bribes to the Trial Judge in return for favorable rulings during the proceedings, so as to convict the Defendant.

9. Assistant Prosecutor Mutchler conspired with Reserve P.O. Mike Brandt and others to extort money totaling in excess of three million dollars, from Target Stores, Inc., by threatening to rediscover the exculpatory videotape evidence, exonerate the Defendant, charge Jane Doe No. 1 with perjury, and charge officials

of Target, Inc., with bribery, thereby exposing Target, Inc. to a civil suit for damages by Defendant, which damages were perceived by Jane Doe No. 1 to total over $500 million, based upon previous jury verdicts in civil rights cases, and which civil suit would bring irreparable damage to Target, Inc.'s corporate reputation.

10. Assistant Prosecutor Mutchler and others conspired with sex-offender counselor Greg Bengry to extort additional funds from Target, Inc., on a continuing basis, using the vehicle of a directed verdict of guilty but mentally ill (hereinafter "GBMI"), which would require rehearings into Defendant's mental condition every six months, at which rehearings Target, Inc., would again be threatened with exposure of its role, and further blackmail payments required, to keep Defendant under supervision by Bengry.

11. When the State Appellate Defender's Office (hereinafter "SADO") issued a bulletin, seeking new GBMI cases with which to challenge the constitutionally of Michigan's GBMI process, trial proceedings were interrupted by the trial court, to enable Assistant Prosecutor Mutchler and others to study the potential consequences of SADO involvement in this case.

12. Upon evaluation of the risks posed by a SADO appeal of the intended verdict of GBMI, Assistant Prosecutor Mutchler and others chose to abandon plans for a GBMI verdict, and instructed Bengry to direct his efforts at obtaining a false confession in writing from Defendant, after which false confession, Defendant was to be murdered to protect the conspirators from discovery.

13. Assistant Prosecutor Mutchler allowed Greg Bengry a month to obtain the desired false confession. When Bengry failed to obtain one, he falsely charged Defendant with violating his probation, and the trial court ordered Defendant imprisoned. *Greg Bengry apologized directly to the Trial Judge in open court at the probation violation hearing for his failure to obtain a confession.* (Emphasis original).

14. Defendant took and passed a polygraph exam by retired MSP chief examiner. This polygraph exam was ignored by the prosecutor, who refiled charges and continued with the malicious prosecution and extortion plan against Target.

II. FINDINGS OF FACT

The underlying matter is a felonious assault trial in which defendant, 16 years old when the crime was committed, was charged as an adult. The incident occurred in the parking lot of a Target Store in Jackson, Michigan. The victim was an employee of Target. The first trial ended with a hung jury. The jury in the second trial found defendant guilty of felonious assault. (Tr p. 68) Defendant had appointed counsel in the first trial, retained counsel in the second trial, and

an appointed appellate counsel in the appeal of the second trial. (Tr pp. 139, 310). The Court of Appeals denied relief. (R Exh A). Raaflaub signed and filed the Motion for Rehearing which is the subject of this matter, and served it on opposing counsel on March 28, 2000. (P Exh 1, Tr p. 66).

Judge Edward Grant did not see P Exh 1 until at least 2 months after March 28, 2000, the date it was filed. (Tr p. 71) The allegations contained in P Exh 1 were never brought to Judge Grant's attention by Raaflaub or J D Walker, defendant's father, (Tr pp. 71, 72) Grant did not receive any money, items of value, sexual favors, or benefit as the trial judge against defendant as alleged in P Exh 1 para.I.B.6, and no one made those allegations during either trial. (Tr pp. 75, 76) The defense attorneys did not bring to Grant's attention that anyone impersonated Heather McLeod during either trial. (Tr p. 74) Grant testified that P Exh 1 para I.B.3 is absolutely false. (Tr p. 79)

The question about a lost or missing Target security tape between the first and second trial in P Exh 1 para I.B.5 was the subject of an evidentiary hearing to determine what happened. (Tr pp. 79, 80) Grant also testified that during the trials, he never signaled to anyone indicating a deal was to be struck, and he was never advised about potential jury tampering. (Tr p. 84-88)

Assistant Prosecutor Wade Mutchler conducted 2 preliminary examinations and 2 criminal trials against defendant, David Alan Walker. Heath McLeod, the victim of the assault, testified at both trials and both preliminary examinations. There was no indication that anyone impersonated McLeod. (Tr pp. 136-141) Mutchler testified that the allegations in P Exh 1 para I.B.6, regarding his conspiracy to bring in a person to impersonate McLeod and to provide sexual favors to the trial judge in return for payments of cocaine and cash were false. (Tr p. 141, 142) Mutchler further testified, after reading P Exh 1 paras I.B.1-14, that the allegations alleging illegal activity either performed by him or conspired by him "have no basis in reality whatsoever

and are utterly false". The only thing he received of value was his normal paycheck from the county. (Tr p. 143, 144)

Heather McLeod testified, after listening to P Exh 1 para I.B.6, that she was the victim of an assault in a Target parking lot in January 1997, that she testified in 2 criminal trials, did not know anyone named Judy, and was not engaged in any illegal conduct associated with the trials of David Alan Walker, (Tr pp. 116-118)

Raaflaub testified that P Exh 1, Motion for Rehearing, was typed by Schubring and he relied on the work of Walker and Schubring, non lawyers, to represent their point of view. Raaflaub believed it was his job to transmit their understanding and argument about the case in the Motion for Rehearing. (Tr pp. 186, 205) Raaflaub met Walker and Schubring in May 1999 at a Libertarian party convention and had at least ten meetings with them through March 28, 2000, when he filed the Motion for Rehearing. (Tr p. 200) Raaflaub knew of the Walker website and reviewed its contents. The website allegedly contained information to support the allegations in P Exh 1. (Tr p. 183)

Raaflaub did not know why the alleged impersonator of McLeod known as "Judy", was included in P Exh 1 Para I.B.6. He did not talk to anyone, other than Schubring and Walker, to personally verify this fact. (Tr p. 199) In support of the charge that Mutchler conspired with an unknown "Judy" to create a fraud on the court to improperly convict the defendant, Raaflaub viewed videotapes of McLeod's testimony on CDs, played on a low order machine giving a hazy picture of McLeod. Again, he deferred to the conclusions of Schubring and Walker which presented their point of view. (Tr pp. 201, 202) With regard to the alleged pay off by cash and cocaine for false testimony in para I.B.6, Raaflaub never saw a transcript containing those facts, and did not remember hearing audio about cash or cocaine, but relied on Schubring and Walker. (Tr pp. 202-204) Raaflaub relied on Schubring and Walker to support the allegations in para

I.B.6 regarding alleged sexual favors provided by McLeod to Judge Grant. (Tr p. 205) Raaflaub knew that the allegations in P Exh 1 attempted to expand the trial record before the Court of Appeals. (Tr p. 210)

Raaflaub never contacted Judge Grant, Mutchler or McLeod to determine if they would deny the proposed allegations in P Exh 1 paras. I.B.1-14. (Tr p. 209) He did not review Schubring's amicus brief sent to the Court of Appeals on January 19, 1999, R Exh C tab 8. (Tr p. 227) Schubring's amicus brief did not raise any of the criminal allegations found in P Exh 1, filed March 28, 2000. (R Exh C tab 8)

Schubring testified that he did not personally investigate whether: Mutchler conspired with the court clerk to supply her with illegal drugs and cash (Tr pp 201, 202); that Mutchler conspired with Jane Doe to impersonate McLeod (Tr pp. 270, 271); that the Judge was having sex with McLeod (Tr pp. 277, 278); that the jury was being bribed (Tr p. 279); and that Mutchler conspired to revoke the probation of defendant. (Tr p. 282).

Schubring drafted P Exh 1 para I.B.6 with input from Walker. Raaflaub did not suggest any changes, amendments, deletions, or additions to paragraph 6. (Tr p. 299) Raaflaub was informed of the amicus brief, R Exh C tab 8, which did not have any allegations of criminal conduct by either the trial judge or the prosecutor. (Tr pp. 303-306) At a meeting, Raaflaub received a copy of the CD's containing all of the images for later viewing. (Tr pp. 306-308) With regard to the missing four pages of trial transcript, Schubring received the transcript from the former appellate attorney and Walker discovered four pages were missing because they were numerically missing from the copy received. (Tr pp. 312-318) Raaflaub never instructed Schubring to do any investigation. (Tr p. 323)

J.D. Walker testified that he did not prepare any of the paragraphs in P Exh 1, Motion for Rehearing. He was present when the motion was being prepared and answered questions from Schubring or Raaflaub. (Tr p. 454-457) Walker believed that the alleged conspiracies existed.

With regard to Formal Complaint paragraph 7 (1), P Exh 1, para I.B.12, relating to a conspiracy by Mutchler to obtain a false confession and to murder his son, Walker testified that Mutchler and P.O. Rogers had a conversation before a court session. This information came from the courtroom videotape after being electronically filtered by special equipment. (Tr p. 461-465) Those statements along with other alleged statements between Milt Munger and Katie Kuzmersky about an alleged plan to murder defendant were not transcribed. Walker claims the statements were picked up from the audio portion of the videotape. (Tr p. 465, 466)

Formal Complaint para 7(j), P Exh 1 para I.B.10, relates to the alleged conspiracy by Mutchler and sex offender Greg Bengry to extort funds from Target Inc. Walker claimed this allegation was based on conversations between Mutchler and P.O. Schuette in the courtroom. The conversations were not on the court transcript but were allegedly on the audio portion of the videotape. Walker did not have the videotape available at the hearing and he did not run the audio through noise filters for quality. He concluded that this was a conspiracy to extort money from Target. (Tr p. 466-469)

Formal Complaint para 7(i), P Exh 1 para I.B.9, relates to a conspiracy between Mutchler and P.O. Mike Brandt to extort $3 million from Target by threatening to rediscover exculpatory videotape evidence to exonerate defendant and to charge Jane Doe No. 1 with perjury. Walker could not recall who determined the amount of $3 million for the extortion and assumed John Doe No. 1 was affiliated with Target. (Tr p. 469-473, 480-484)

John Doe No. 1 in para 7(h), (g), P Exh 1 paras I.B.8, 7, relate to an alleged conspiracy between Mutchler and John Doe No. 1 to pay bribes to the judge and the jury. Walker based

those allegations on whispered conversations and a side bar conference, neither of which were on the trial transcript. Walker testified he picked up the conversations through the electronic filters. The tapes were not available at the hearing. (Tr p. 473-476)

During the criminal proceedings, Walker attempted to hire the law firm of Fieger and Schwartz to bring a civil action against Target Inc. That firm would not consider the case until Target either won or lost in the criminal matter. (Tr p. 486) Walker believed the alleged conspiracies kept his son from being exonerated from the criminal charges. He believed the Judge, prosecution, the key witness, and the police officers were all conspiring against his son. (Tr p. 488, 489)

Walker was asked by the Master to play segments of the audio from the trial videotapes. The first segment relates to the 4 pages of missing trial transcript, P Exh 1 para I.B.3, where it is alleged that Mutchler conspired with the trial judge and trial clerk to withhold evidence in the form of the missing pages. (Tr p. 520, 521) The revived pages say "videotape malfunction" but Walker says the term "fix the tape" can be heard. (Tr p. 522; R Exh C tab 9 p. 553) After playing the audio at the hearing, neither the Master, Nearing, counsel for Petitioner, nor Raaflaub heard the words, "fix the tape".

Another audio tape segment involved P Exh 1 para I.B.6, which states that Mutchler conspired with Jane Doe No. 1 to provide sexual favors to the trial judge. Walker claims to have heard the audio tape during the victim statement of McLeod where she said something to the effect of, "the court had put a lot of stress on her when came from screwing". Neither the Master, Nearing, counsel for Petitioner, nor Raaflaub heard any such statement. (Tr p. 524-528)

Walker could not remember whether the audio relating to the 4 missing pages and McLeod's victim statement was played for Raaflaub when the Motion for Rehearing, P Exh 1, was being prepared. (Tr p. 528, 529)

III. CONCLUSIONS OF LAW

A. Applicable Law - MRPC 8.2(a) and the First Amendment

The Respondent claims that statements made in his Motion for Rehearing filed in the Michigan Court of Appeals are protected by the First Amendment of the United States Constitution. The Court of Appeals affirmed the criminal assault conviction of his client. Application of a free speech defense in the politics of an election campaign for judgeships in Michigan is analyzed in In re Chmura, 461 Mich 517 (2000), herein (Chmura I); and, In re Chmura, 464 Mich 58 (2001), herein (Chmura II). First amendment issues have been analyzed in attorney discipline cases involving MRPC Rule 8.2(a) in Grievance Administrator v Fieger, ADB Case No. 94-186-GA, herein (Fieger II) decided September 2, 1997 and (Fieger III) decided May 3, 1999.

MRPC 8.2(a) prohibits attorneys from defaming judges, public legal officers, and candidates for judicial or legal offices. Under the general defamation standard, a citizen who defames a judicial or legal officer enjoys the benefit of the subjective "actual malice" test discussed by the U.S. Supreme Court in New York Times v Sullivan, 376 US 254, 84 S Ct 710, 11 L Ed 2d 686 (1964). Under this subjective test, "reckless disregard" is not based on what the reasonable speaker or publisher would have done, but rather upon the speaker's actual state of mind.

The Michigan Supreme Court rejected the actual malice standard for attorneys and adopted a more restrictive "objective test" for allegations of misconduct stemming from lawyer speech. Chmura I. Although Chmura I involved the Code of Judicial Conduct, the court used the language found in MRPC 8.2(a) to amend Canon 7 (B) (1) (d) to read: "should not knowingly, or with reckless disregard, use or participate in the use of any form of public communication that is false".

Fieger III, decided by the ADB on May 3, 1999, stated that the "subjective standard" shall be used in analyzing MRPC 8.2(a). The Michigan Supreme Court in Grievance Administrator v Fieger, Case No. 11478, 613 NW 2d 723 (2000), remanded Fieger III for reconsideration in light of Chmura I. This remand instructed the ADB to use the objective rather than the subjective standard in analyzing free speech as a defense to attorney misconduct.

Petitioner has the burden of showing by clear and convincing evidence that the statements contained in the subject Motion for Rehearing, filed in the Michigan Court of Appeals P Exh 1 paras I.B.1-14, are false. Chmura II, 464 Mich at 71-72; Fieger III, p 4.

Chmura I cites Standing Committee on Discipline of the United States Dist Court for the Central Dist of California v Yagman, herein (Yagman) 55 F 3d 1430 (9th Cir 1995) as a basis for adopting the objective standard. Yagman p. 1437 defines the objective standard as, "what the reasonable attorney, considered in light of all his professional functions, would do in the same or similar circumstances". The inquiry may take into account whether the attorney pursued readily available avenues of investigation. Yagman p. 1437, n13.

B. Application of Law to Facts

Rules 8.2 (a) states:

> A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicative officer, or public legal officer, or of a candidate for election or appointment to judicial or legal office.

As stated previously, this rule as construed by our Supreme Court does not incorporate the New York Times actual malice standard, but instead uses an objective standard. The free speech umbrella does not apply if Petitioner shows the statements made were false, and Raaflaub either knew they were false or made them with reckless disregard as to their truth or falsity.

Rule 8.2 (a) applies to Judge Grant and to Assistant Prosecutor Mutchler as a public legal officer.

The statements in the 14 paragraphs of P Exh 1, except 11 and 14, allege conspiracies to commit crimes of bribery, extortion, murder, obtaining a false confession, concealing or manipulating evidence, theft, delivering illegal drugs, and filing a false criminal complaint. The criminal trial judge is included in paragraphs 3, 6, and 8.

The First Amendment and MRPC 8.2 protect opinions and rhetorical hyperbole. "Opinions" are always protected by the First Amendment. However, some statements couched in the form of an opinion may contain factual connotations. If statements of opinion set forth the facts relied upon, and the facts are true or made after reasonable inquiry, the opinion is protected speech under the First Amendment. Statements which impute specific criminal acts are not entitled to free speech protection even if framed in opinion form, Yagman pp. 1440. None of the statements at issue herein can be viewed as hyperbole or opinion. They are, without exception, factual assertions.

Raaflaub relied on two biased individuals for facts, without any verification. The allegations are serious criminal conspiracies engaged in by the trial judge and the prosecutor. Raaflaub failed to conduct any independent inquiry(ies). Raaflaub failed to attempt to and/or to contact the judge, the prosecutor, or the victim before making the allegations set forth in the Motion for Rehearing. Raaflaub admits that P Exh 1 paras I.B.1-14 are factual and not hyperbole. (Tr pp. 236)

With respect to P Exh 1 para I.B.3, the existence of the alleged missing 4 pages of transcript are confirmed in endnote 3. A reasonable attorney would be aware that the allegations of para 3 are controverted in the endnote of the same motion and would not make serious criminal allegations under those circumstances.

A reasonable attorney would have reviewed Schubring's amicus brief mailed to the Court of Appeals, particularly since he was relying on Schubring and Walker to provide the allegations for the Motion for Rehearing. Schubring's amicus brief did not raise any issues regarding sex, drugs or money. At the hearing before the Master, Raaflaub admits he would not have filed his motion ". . . in this form . . .". (Tr pp. 215, 243, 244). A reasonable attorney would have verified the truth of the serious allegations before filing this motion.

Walker's son was convicted of felonious assault charges. Both Raaflaub and Schubring relied heavily on Walker to substantiate the outlandish allegations of criminal acts contained in the Motion for Rehearing. Walker, in turn, relied heavily on statements not captured or heard on tape or in the transcript, which no one else can hear, and which are not part of the criminal trial record. A reasonable attorney would not have found sufficient evidence to support the allegations contained in the Motion for Rehearing.

The criminal allegations in P Exh 1 I.B.1-14 are false. This is based on the uncontroverted testimony of Judge Grant, Mutchler and Heather McLeod.

Raaflaub made incredibly false statements by relying on a non-lawyer, Walker, who admits his bias. Walker, the father of defendant and living on social security disability income only, could lose civil claims against Target Inc. if his son's conviction survived. Raaflaub claims reliance on Walker and Schubring. Schubring points the finger at Walker. Walker, who knew Raaflaub for over one year before the motion was filed, shows himself as highly opinionated and drawing his conclusions without supporting facts.

A reasonable attorney would not have filed a Motion for Rehearing of the appeal of a criminal conviction without reviewing the record on appeal and without verifying the factual basis for alleged crimes. A review of the record before the Court of Appeals would have shown

the motion to be an improper attempt to enlarge the appellate record with serious criminal allegations against the trial judge and the prosecutor. Respondent violated MRPC 8.2 (a).

With regard to paragraph 10(a) of the Formal Complaint, I conclude that statements made in a pleading which are not well grounded in fact may give rise to discipline if an appropriate Rule of Professional Conduct (such as MRPC 3.1) is pled. I am unwilling to conclude that the Supreme Court, in adopting MCR 9.104(1)-(4) or other catch-all rules, intended a violation of MCR 2.114(D) to become a basis for discipline instead of, or in addition to, other Rules of Professional Conduct which could be charged.

As to paragraphs 10(b) and (c) of the Formal Complaint, I find that Raaflaub made the statements referenced therein; the statements alleging criminal conduct were false; and, the statements were made with reckless disregard as to their truth or falsity, i.e., that they were made without "a reasonable factual basis." Chmura 1, 461 Mich at 544.

IV. CONCLUSION

The First Amendment fails to protect Raaflaub's statements alleging that the trial judge and prosecutor conspired to commit crimes to insure that defendant would be found guilty of felonious assault. Raaflaub is guilty of attorney misconduct pursuant to MRPC Rule 8.2 (a).

The Master further concludes that MRPC 6.5 has not been violated. Any violation of MCR 2.114(D) which may exist is not a proper basis for discipline with MRPC 3.1 having not been charged in the Formal Complaint.

MILES A. HURWITZ (P15295)
Master
8283 North Telegraph Road
Dearborn Heights, MI 48127
(313) 278-7030

Dated: April 5, 2002

STATE OF MICHIGAN

ATTORNEY DISCIPLINE BOARD

Grievance Administrator,
Attorney Grievance Commission,
State of Michigan,

Petitioner,

v. ADB Case No. 01-94-GA

David H. Raaflaub, P-29975,

Respondent.
_____/

Washtenaw County Hearing Panel #1

Jerold Lax, Chairperson
Stefani A. Carter, Member
Thomas E. Dew, Member

DECISION OF HEARING PANEL
REGARDING DISCIPLINE

On April 5, 2002, Master Miles A. Hurwitz filed his report in this matter, concluding that the evidence supported the charge that Respondent, during the course of representing the defendant in a criminal matter, had violated MRPC 8.2(a), by filing a motion for rehearing in the Michigan Court of Appeals in which Respondent had made false accusations concerning a judge and prosecutor with reckless disregard as to the truth or falsity of those statements. In his report, the Master considered and rejected various constitutional challenges Petitioner had made to the imposition of discipline. On June 25, 2002, the panel adopted the Master's report and directed that a hearing be held on the appropriate discipline to be imposed.

A hearing concerning the level of discipline was held on August 8, 2002, at which time the Grievance Administrator suggested that the Respondent's conduct warranted discipline

APPENDIX C

ranging from 180-day suspension, which would require reinstatement before Respondent could again practice law, to a 3-year suspension, which would require recertification. The Grievance Administrator cited two Michigan Supreme Court cases (*In re Estes*, 355 Mich 411 (1959) and *In re Mains*, 121 Mich 603 (1899)) and two Attorney Discipline Board cases (*James A. Lepley* (1991) and *William A. Ortman* (1995)) which were alleged to be comparable to the present case and in which the penalties imposed ranged from suspension for a period requiring reinstatement to disbarment. The Grievance Administrator also suggested that a prior 1996 order of reprimand involving respondent constituted an aggravating factor.

Respondent reiterated his constitutional objections to the proceedings and to the imposition of discipline, attempted to distinguish the cases cited by the Grievance Administrator, and also offered as mitigating factors that his conduct involved no dishonest or selfish motive and that he was being treated for depression at the time of the incident. Further, Respondent suggested that the 1996 order of reprimand was too remote in time to constitute an aggravating factor.

The panel has considered the evidence presented and the authorities cited, as well as the American Bar Association Standards for Imposing Lawyer Sanctions. While the cited authorities have some relevance, the panel acknowledges that each case must be decided on its unique facts. Section 6.1 of the ABA standards, dealing with false statements, suggests that, in the absence of aggravating or mitigating circumstances, disbarment may be appropriate when an attorney has made a false statement with intent to deceive the court, and that suspension may be appropriate when a lawyer knows that false statements are being submitted. While the panel does not find sufficient evidence of an intent to deceive, the panel does find that Respondent's reckless disregard of the truth or falsity of his statements warrants suspension, and that

suspension of a length requiring reinstatement is warranted by the facts. Neither the aggravating or mitigating circumstances brought to the panel's attention are sufficient to result in modification of the penalty which would otherwise be imposed.

Based upon the foregoing, it is the unanimous determination of the panel that Respondent be suspended for a period of 180 days.

Jerold Lax, Chairperson

Date September 26, 2002

STATE OF MICHIGAN

IN THE COURT OF APPEALS

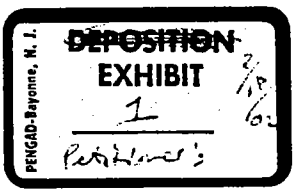
PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

Nos. 208097,216240
Jackson Circuit Court
LC No 97-081140-FC

Vs.

DAVID ALLEN WALKER,
Defendant-Appellant
_____/

Jackson County Prosecutor's Office
Attorney for Plaintiff-Appellee,
_____/



DAVID H. RAAFLAUB (P29975).
Attorney for Defendant-Appellant.
400 West Washington St., Ste. 700
Ann Arbor, Michigan 48103
(734)769-2645
_____/

Robert W. Schubring, Vice-President,
Citizens Against Police and Prosecutorial Corruption, Inc.
Amicus Curiae
2723 Avonhurst Drive
Troy, Michigan 48084
(248)647-1916

Motion for Rehearing

Defendant-Appellant moves for rehearing of the decision dated March 7, 2000, for the following reasons..

I. This motion is made under MCR 7.215(g) and pursuant to the files and records in this case, the transcript below, the video tapes of the proceedings and the affidavit of Joe Walker in support of motion for rehearing.

II. A copy of the opinion of which rehearing is sought, is attached hereto.

3. Pursuant to MCR 2.119(F)(3). there exists a palpable error by which the court and the parties have been misled, the correction of which error must result in a different

APPENDIX A

disposition.

I. Prosecutorial Misconduct

A. Defendant was videotaped by security cameras, inside the Target store at the Jackson Crossing Mall, at the exact time that a Target employee, who identified herself as "Heather Rene McLeod", claimed she was robbed at knifepoint by an assailant, who robbed her in her car, which was parked outside in a busy parking lot. Defendant's alibi was thereby established.

B. Assistant Prosecutor Wade Norman Mutchler was aware of the proof of Defendant's alibi, but brought charges unlawfully.

1. Assistant Prosecutor Wade Norman Mutchler, together with others, conducted a racketeering enterprise as defined under 18 USC 1961 et seq., under which they abused their lawful powers of office to extort money for personal financial gain.(1)
2. Assistant Prosecutor Mutchler conspired with Reserve P.O. Mike Brandt, who was the Target store security director, to remove from court and conceal the videotape which proved Defendant's alibi, thereby denying Defendant the use of exculpatory evidence. Their actions were recorded on official courtroom videotape (2), and observed by Detective Gail Rogers, who swore that Reserve P.O. Mike Brandt was the last person seen with the exculpatory videotape. The testimony of Cheryl Strzyzewski, a civilian JPD employee, and official evidence room logs also reflect that BOTH evidence videos had been returned to Target Stores in April following the first trial(3).
3. Assistant Prosecutor Mutchler conspired with the Trial Judge and Court Clerk to remove Det. Rogers' testimony about the evidence theft, in which he had participated, from the trial transcript(4). Four pages of Det. Rogers' testimony were not transcribed and were withheld from the Michigan Court of Appeals(5). Other critical testimony was unlawfully withheld from the Michigan Court of Appeals by tampering with the trial

transcript(6).

4. Assistant Prosecutor Mutchler conspired with the Court Clerk, to supply her with illegal drugs and cash(7).

5. Assistant Prosecutor Mutchler conspired with P.O. Gary Schuette to fabricate a story of how the exculpatory evidence videotape was misplaced and lost through supposed negligence(8).

6. Assistant Prosecutor Mutchler conspired with Jane Doe No. 1, known by name only as "Judy", to impersonate Heather R. McLeod in court, to make false testimony about the alleged robbery, and to provide sexual favors for the trial judge, in return for payments of cocaine and cash(9).

7. Assistant Prosecutor Mutchler conspired with the Court Clerk and with John Doe No. 1, an employee of Target Stores, Inc. to pay bribes to members of the jury in return for a vote to convict the Defendant(10).

8. Assistant Prosecutor Mutchler conspired with the Court Clerk and with John Doe No. 1, an employee of Target, Inc. to pay bribes to the Trial Judge in return for favorable rulings during the proceedings, so as to convict the Defendant(11).

9. Assistant Prosecutor Mutchler conspired with Reserve P.O. Mike Brandt and others to extort money totaling in excess of three million dollars, from Target Stores, Inc., by threatening to rediscover the exculpatory videotape evidence, exonerate the Defendant, charge Jane Doe No. 1 with perjury, and charge officials of Target, Inc., with bribery, thereby exposing Target, Inc. to a civil suit for damages by Defendant, which damages were perceived by John Doe No. 1 to total over $ 500 million, based upon previous jury verdicts in civil rights cases(12), and which civil suit would bring irreparable damage to Target, Inc.'s corporate reputation.

10. Assistant Prosecutor Mutchler and others conspired with sex-offender counselor Greg Bengry to extort additional funds from Target, Inc., on a continuing basis, using the vehicle

of a directed verdict of guilty but mentally ill (hereinafter "GBMI"), which would require rehearings into Defendant's mental condition every six months, at which rehearings Target, Inc., would again be threatened with exposure of its role, and further blackmail payments required, to keep Defendant under supervision by Bengry(13).

11. When the State Appellate Defender's Office (hereinafter "SADO") issued a bulletin(14), seeking new GBMI cases with which to challenge the constitutionality of Michigan's GBMI process, trial proceedings were interrupted by the trial court(15), to enable Assistant Prosecutor Mutchler and others to study the potential consequences of SADO involvement in this case(16).

12. Upon evaluation of the risks posed by a SADO appeal of the intended verdict of GBMI, Assistant Prosecutor Mutchler and others chose to abandon plans for a GBMI verdict, and instructed Bengry to direct his efforts at obtaining a false confession in writing from Defendant, after which false confession, Defendant was to be murdered to protect the conspirators from discovery(17).

13. Assistant Prosecutor Mutchler allowed Greg Bengry a month to obtain the desired false confession(18). When Bengry failed to obtain one, he falsely charged Defendant with violating his probation(19), and the trial court ordered Defendant imprisoned. *Greg Bengry apologized directly to the Trial Judge in open court at the probation violation hearing for his failure to obtain a confession*(20).

14. Defendant took and passed a polygraph exam by retired MSP chief examiner. This polygraph exam was ignored by the prosecutor, who refiled charges and continued with the malicious prosecution and extortion plan against Target.

II. Ineffective Representation by Trial Counsel.

Defendant sought multiple times to be represented by counsel during police questioning. Police repeatedly refused to allow him to be represented by counsel during questioning. P.O. Schuette admitted on the record that Defendant sought counsel, and tacitly acknowledged the

mandate that all police questioning must cease, until a defendant is provided with counsel(21).

A. P.O. Gary Schuette disobeyed the Defendant's right to counsel, and continued badgering Defendant. P.O. Schuette falsely stated, "He cannot have an attorney until we get into court". P.O. Schuette and others falsely arrested Defendant's father, a diabetic, by telling him that he could not leave the station until questioning was completed(22). P.O. Schuette committed perjury, by falsely testifying to the trial court that Defendant waived his right to counsel(21).

B. P.O. Gary Schuette made contradictory statements about there having been a confession. Owing to ineffectiveness of trial counsel, it was not noted March 24th at a Walker hearing that the police had a camera in place to videotape the interrogation, which would have disproven P.O. Schuette's claim that a confession was made (22). Officer Gary Schuette testified that defendant Walker made a loud outburst, admitting guilt, within range of a police station video camera. Yet Officer Gary Schuette also testified that this very loud outburst was not audible on the police station's videotape. These statements under oath are in direct contradiction to each other(23). Officer Gary Schuette's own records indicate the interrogation lasted until 10-15 minutes before the 1:13 time noted on the Miranda form. Yet Officer Schuette testified that the form should read "11:30" or about 1.5 hours shorter than the officer's own records indicated(24). Officer Gary Schuette testified at the retrial that he had concerns about the mental state of defendant David A. Walker during questioning. This is in direct contradiction to his prior testimony in the Walker hearing, which sought the unwitnessed, unrecorded, and unsigned "confession" of defendant David A. Walker to be(25) admitted into evidence. Officer Gary Schuette displayed a continuing pattern of changing his testimony, depending upon the effect desired. At the present trial, trial counsel made a motion(26) to introduce videotaped testimony from the Walker hearing, and the April mistrial, into evidence. The motion was denied. At the present trial, P.O. Schuette did not admit to

the existence of a videotaped record of the interrogation.

C. Defendant was abused psychologically by P.O. Schuette, and required hospitalization at U of M (Ann Arbor) later that day, for one week, before he was charged(27). Defendant was incompetent to make a knowing confession owing to his mental state, which defense should have been raised in the absence of the videotape of the interrogation, and the absence of the previous contradictory testimony of P.O. Schuette. Trial counsel failed to raise the issue of Defendant's mental state or hospitalization which resulted from abuse inflicted upon the defendant by P.O. Schuette.

D. Due to ineffectiveness of trial counsel, a motion for habeas corpus was made, but not enforced by the trial court(28), to present to the jury the person most likely to have assaulted Heather McLeod in the parking lot, to wit, Darren Kevin Blodgett, who perpetrated a series of robberies in parking lots and was arrested January 26th, 1997, while Defendant was home recuperating after his hospitalization. Mr. Blodgett resembled Defendant David Walker, and his height and weight more nearly matched the description provided by Heather McLeod, than did Defendant Walker(29).

E. Due to ineffectiveness of counsel, no objection was made to the composition of the jury panel, which

1. contained persons who were not properly identified(30) during *voir dire,*
2. contained persons who were acquainted with police officers and prosecution witnesses, and:
3. that half the jurors impaneled were known personally to Det. Rogers(31),
4. that the trial judge, owing to bias, instructed members of the jury pool that they

may "not want to dutifully recognize" prosecution witnesses(32).

III Inadequacy of Appellate Counsel

A. Due to ineffectiveness of appellate counsel, the Court of Appeals was misled, because no reference to the trial record was made, which provides evidence that the police and prosecution acted in bad faith, in that the judge, police, prosecutor, and employees of Target, conspired to conceal the store tapes, which proved defendant's alibi, i.e., that he was inside the store at the time of the alleged offense in the parking lot.

B. Due to ineffectiveness of appellate counsel, it was not brought out that "Judy" appeared as an imposter, to impersonate Heather McLeod, was paid for her services in crack cocaine and cash, and was made available to the judge, the assistant prosecutor, and the police, for sexual favors.

C. Due to ineffectiveness of appellate counsel, it was not brought out that the trial judge clearly stated a prejudicial belief that Defendant was guilty(33), and therefore had every reason to rule in a biased fashion, apart from any consideration of personal financial gain.

Facts:

David Walker was determined to be telling the truth when he denied assaulting Heather McLeod. See Motion for Brady Hearing dated September 27, 1997.

Darren Kevin Blodgett was arrested January 26, 1997 and found guilty of multiple parking lot attacks involving other downtown parking lots. Defense was prevented from bringing him to trial from a State Prison to show that he was the most likely suspect for the attack on Heather McLeod. A writ of habeas corpus was ignored, thereby denying defense counsel the right to show someone else likely committed the attack on Heather McLeod. Mr. Blodgett fits the victim's description better than the defendant does, and he resembles the facial features of the defendant.

Court videotapes show sidebar conversations in which the Judge and Prosecutor discuss payoffs to themselves to blackmail Target and fix this case.

None of defendant's attorneys placed Joe Walker on the stand to testify that he had requested an attorney during police interrogation of his son.

Citations

Note on Citations: In the interest of justice, Citizens Against Police and Prosecutorial Corruption, Inc., a nonprofit Michigan private operating foundation, has established space on its Internet website, to provide any and all members of the public with information on this case. Citations listed below as "See CAPPC Website" refer to links on the electronic version of this Motion, which will become operational at or before midnight, March 30, 2000. These Website links include still and full-motion video, and audio recordings, excerpted from official courtroom videotape, that demonstrate the performance of criminal acts by co-conspirators, who abused their powers of office to operate a racketeering enterprise within the Jackson County Courthouse. The original courtroom videotape, taken during the trial, is secured in custody in bank safe deposit vaults. Official copies are also kept at the Jackson County Courthouse, and are available as public records.

1. (See CAPPC website). http://www.cappc.org/briefs/walker.html
2. (See CAPPC website).
3. Strzyzewski: Trial transcript, p. 459. Rogers: Trial Transcript, pp. 549-552 and CAPPC website.
4. (See CAPPC website).
5. Trial transcript, pp. 549-552 is reconstructed on CAPPC website.
6. (See CAPPC website).
7. (See CAPPC website).
8. P.O. Schuette's version of events is at Evidentiary Hearing transcript, pp. 69-72.
9. (See CAPPC website).
10. (See CAPPC website).
11. (See CAPPC website).
12. (See CAPPC website).
13. (See CAPPC website).
14. (See CAPPC website).
15. Trial transcript, pp. 883-884, reveals a postponement of deliberations, owing to an unspecified emergency involving juror Carol Neville. This corresponds with (14) and (16).
16. (See CAPPC website).
17. (See CAPPC website).
18. (See CAPPC website).
19. (See CAPPC website).
20. (See CAPPC website).
21. Walker Hearing transcript, pp. 30-31.
22. Trial transcript p. 697, lines 10 - 22. See also attached "Certificate of Joe Walker".
23. Trial transcript p. 419, contradicted by transcript of 97-78822FC (4-15-97), p. 92.
24. Walker Hearing transcript pp. 16-17.
25. Compare Walker Hearing transcript, p. 35, line 21-24, with Trial transcript, pp. 435-437.
26. Motion for Brady Hearing, File No. 97-81140-FC, dated September 27, 1997.
27. (See CAPPC website).
28. Trial transcript, p. 665 line 23 - p. 666, line 20.
29. (See CAPPC website).
30. Trial transcript, p. 79.
31. (See CAPPC website).
32. Trial transcript, p. 85, line 20-22. Please compare with CAPPC website.
33. Evidentiary Hearing transcript, p. 14, lines 1-4.

We petition the Court to reverse the conviction of David Allen Walker for felonious assault.

DAVID H. RAAFLAUB (P29975)
400 West Washington St., Ste. 700
Ann Arbor, Michigan 48103
734-769-2645

STATE OF MICHIGAN
IN THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

Vs.

DAVID ALLEN WALKER,
Defendant-Appellant
_____/

Nos. 208097,216240
Jackson Circuit Court
LC No 97-081140-FC

Jackson County Prosecutor's Office.
Attorney for Plaintiff-Appellee,

David H. Raaflaub (P29975)
Attorney for Defendant-Appellant
400 West Washington St., Ste. 700
Ann Arbor, Michigan 48103
734-769-2645
_____/

CERTIFICATE OF JOE WALKER IN SUPPORT OF MOTION FOR REHEARING

I, Joe Walker, do certify under penalty of perjury that the following statements are true:

1. I am the father of the defendant.
2. I was present at the Jackson Police station on January 13, 1997, when my son was questioned by the police.
3. I requested multiple times to have an attorney present.
4. I asked how an attorney would be provided, and was told an attorney would not be provided then but when we went to court but could "not have one at this time." I advised all of my son's attorneys of my requests for an attorney during interrogation.
5. Officer Gary A. Schuette tacitly acknowledged my requests for an attorney when he testified at the Walker hearing, 03-24-97 at page 10: "Mr. Walker advised me that he didn't have much money and how an attorney would be appointed for him. I told him that the courts would provide an attorney for him." Officer Schuette was saying an attorney would not be appointed until later, which misrepresented the right to counsel.
6. At no time was David or me called in any proceeding to testify that I had requested an attorney to be present during David's questioning by the police.
7. Despite my requests for an attorney, the police continued to question David.
8. Although a video camera was set up in the room plugged in and aimed at the interrogation area. Police officers deny the existence of any recording from this video camera or any other recording audio or video of David's interrogation.
9. No notes were made or was a statement requested to be in writing.

I do not say anything further.

Joe David Walker

STATE OF MICHIGAN

ATTORNEY DISCIPLINE BOARD

02 APR -9 AM 9:32

Grievance Administrator,
Attorney Grievance Commission,
State of Michigan,

Petitioner,

v ADB Case# 01-94-GA

David H. Raaflaub, P-29975

Respondent.
_____/

MASTER'S REPORT

I. PROCEEDINGS

A one count Formal Complaint filed on July 10, 2001 charged Respondent with causing a Motion for Rehearing to be filed in the Michigan Court of Appeals without reasonable inquiry to determine if certain statements were well grounded in fact. Respondent is also charged with making false statements about Circuit Court Judge Edward J. Grant and Assistant Prosecutor Wade N. Mutchler, which statements he either knew were false, or he made them with reckless disregard as to their truth or falsity. The statements are contained in paragraphs 7 (a) - (n) of the Formal Complaint and P Exh 1 Paras I.B.1-14. The Master heard testimony from trial Judge Edward Grant, Assistant Prosecutor Wade Mutchler, assault victim, Heather McLeod, Respondent, David Raaflaub, Robert W. Schubring, and the criminal defendant's father, Joe D. Walker.

APPENDIX B

The statements at issue from P Exh 1,I.B., Motion for Rehearing, follow:

1. Assistant Prosecutor Wade Norman Mutchler, together with others, conducted a racketeering enterprise as defined under 18 USC 1961 et seq., under which they abused their lawful powers of office to extort money for personal financial gain.

2. Assistant Prosecutor Mutchler conspired with Reserve P.O. Mike Brandt, who was the Target store security director, to remove from court and conceal the videotape which proved Defendant's alibi, thereby denying Defendant the use of exculpatory evidence. Their actions were recorded on official courtroom videotape and observed by Detective Gail Rogers, who swore that Reserve P.O. Mike Brandt was the last person seen with the exculpatory videotape. The testimony of Cheryl Strzyzewski, a civilian JPD employee, and official evidence room logs also reflect that BOTH evidence videos had been returned to Target Stores in April following the first trial.

3. Assistant Prosecutor Mutchler conspired with the Trial Judge and Court Clerk to remove Det. Rogers' testimony about the evidence theft, in which he had participated, from the trial transcript. Four pages of Det. Rogers' testimony were not transcribed and were withheld from the Michigan Court of Appeals. Other critical testimony was unlawfully withheld from the Michigan Court of Appeals by tampering with the trial transcript.

4. Assistant Prosecutor Mutchler conspired with the Court Clerk, to supply her with illegal drugs and cash.

5. Assistant Prosecutor Mutchler conspired with P.O. Gary Schuette to fabricate a story of how the exculpatory evidence videotape was misplaced and lost through supposed negligence.

6. Assistant Prosecutor Mutchler conspired with Jane Doe No. 1, known by name only as "Judy", to impersonate Heather R. McLeod in court, to make false testimony about the alleged robbery, and to provide sexual favors for the trial judge, in return for payments of cocaine and cash.

7. Assistant Prosecutor Mutchler conspired with the Court Clerk and with John Doe No. 1, an employee of Target Stores, Inc. to pay bribes to members of the jury in return for a vote to convict the Defendant.

8. Assistant Prosecutor Mutchler conspired with the Court Clerk and with John Doe No. 1, an employee of Target, Inc. to pay bribes to the Trial Judge in return for favorable rulings during the proceedings, so as to convict the Defendant.

9. Assistant Prosecutor Mutchler conspired with Reserve P.O. Mike Brandt and others to extort money totaling in excess of three million dollars, from Target Stores, Inc., by threatening to rediscover the exculpatory videotape evidence, exonerate the Defendant, charge Jane Doe No. 1 with perjury, and charge officials

of Target, Inc., with bribery, thereby exposing Target, Inc. to a civil suit for damages by Defendant, which damages were perceived by Jane Doe No. 1 to total over $500 million, based upon previous jury verdicts in civil rights cases, and which civil suit would bring irreparable damage to Target, Inc.'s corporate reputation.

10. Assistant Prosecutor Mutchler and others conspired with sex-offender counselor Greg Bengry to extort additional funds from Target, Inc., on a continuing basis, using the vehicle of a directed verdict of guilty but mentally ill (hereinafter "GBMI"), which would require rehearings into Defendant's mental condition every six months, at which rehearings Target, Inc., would again be threatened with exposure of its role, and further blackmail payments required, to keep Defendant under supervision by Bengry.

11. When the State Appellate Defender's Office (hereinafter "SADO") issued a bulletin, seeking new GBMI cases with which to challenge the constitutionally of Michigan's GBMI process, trial proceedings were interrupted by the trial court, to enable Assistant Prosecutor Mutchler and others to study the potential consequences of SADO involvement in this case.

12. Upon evaluation of the risks posed by a SADO appeal of the intended verdict of GBMI, Assistant Prosecutor Mutchler and others chose to abandon plans for a GBMI verdict, and instructed Bengry to direct his efforts at obtaining a false confession in writing from Defendant, after which false confession, Defendant was to be murdered to protect the conspirators from discovery.

13. Assistant Prosecutor Mutchler allowed Greg Bengry a month to obtain the desired false confession. When Bengry failed to obtain one, he falsely charged Defendant with violating his probation, and the trial court ordered Defendant imprisoned. *Greg Bengry apologized directly to the Trial Judge in open court at the probation violation hearing for his failure to obtain a confession.* (Emphasis original).

14. Defendant took and passed a polygraph exam by retired MSP chief examiner. This polygraph exam was ignored by the prosecutor, who refiled charges and continued with the malicious prosecution and extortion plan against Target.

II. FINDINGS OF FACT

The underlying matter is a felonious assault trial in which defendant, 16 years old when the crime was committed, was charged as an adult. The incident occurred in the parking lot of a Target Store in Jackson, Michigan. The victim was an employee of Target. The first trial ended with a hung jury. The jury in the second trial found defendant guilty of felonious assault. (Tr p. 68) Defendant had appointed counsel in the first trial, retained counsel in the second trial, and

an appointed appellate counsel in the appeal of the second trial. (Tr pp. 139, 310). The Court of Appeals denied relief. (R Exh A). Raaflaub signed and filed the Motion for Rehearing which is the subject of this matter, and served it on opposing counsel on March 28, 2000. (P Exh 1, Tr p. 66).

Judge Edward Grant did not see P Exh 1 until at least 2 months after March 28, 2000, the date it was filed. (Tr p. 71) The allegations contained in P Exh 1 were never brought to Judge Grant's attention by Raaflaub or J D Walker, defendant's father, (Tr pp. 71, 72) Grant did not receive any money, items of value, sexual favors, or benefit as the trial judge against defendant as alleged in P Exh 1 para.I.B.6, and no one made those allegations during either trial. (Tr pp. 75, 76) The defense attorneys did not bring to Grant's attention that anyone impersonated Heather McLeod during either trial. (Tr p. 74) Grant testified that P Exh 1 para I.B.3 is absolutely false. (Tr p. 79)

The question about a lost or missing Target security tape between the first and second trial in P Exh 1 para I.B.5 was the subject of an evidentiary hearing to determine what happened. (Tr pp. 79, 80) Grant also testified that during the trials, he never signaled to anyone indicating a deal was to be struck, and he was never advised about potential jury tampering. (Tr p. 84-88)

Assistant Prosecutor Wade Mutchler conducted 2 preliminary examinations and 2 criminal trials against defendant, David Alan Walker. Heath McLeod, the victim of the assault, testified at both trials and both preliminary examinations. There was no indication that anyone impersonated McLeod. (Tr pp. 136-141) Mutchler testified that the allegations in P Exh 1 para I.B.6, regarding his conspiracy to bring in a person to impersonate McLeod and to provide sexual favors to the trial judge in return for payments of cocaine and cash were false. (Tr p. 141, 142) Mutchler further testified, after reading P Exh 1 paras I.B.1-14, that the allegations alleging illegal activity either performed by him or conspired by him "have no basis in reality whatsoever

and are utterly false". The only thing he received of value was his normal paycheck from the county. (Tr p. 143, 144)

Heather McLeod testified, after listening to P Exh 1 para I.B.6, that she was the victim of an assault in a Target parking lot in January 1997, that she testified in 2 criminal trials, did not know anyone named Judy, and was not engaged in any illegal conduct associated with the trials of David Alan Walker, (Tr pp. 116-118)

Raaflaub testified that P Exh 1, Motion for Rehearing, was typed by Schubring and he relied on the work of Walker and Schubring, non lawyers, to represent their point of view. Raaflaub believed it was his job to transmit their understanding and argument about the case in the Motion for Rehearing. (Tr pp. 186, 205) Raaflaub met Walker and Schubring in May 1999 at a Libertarian party convention and had at least ten meetings with them through March 28, 2000, when he filed the Motion for Rehearing. (Tr p. 200) Raaflaub knew of the Walker website and reviewed its contents. The website allegedly contained information to support the allegations in P Exh 1. (Tr p. 183)

Raaflaub did not know why the alleged impersonator of McLeod known as "Judy", was included in P Exh 1 Para I.B.6. He did not talk to anyone, other than Schubring and Walker, to personally verify this fact. (Tr p. 199) In support of the charge that Mutchler conspired with an unknown "Judy" to create a fraud on the court to improperly convict the defendant, Raaflaub viewed videotapes of McLeod's testimony on CDs, played on a low order machine giving a hazy picture of McLeod. Again, he deferred to the conclusions of Schubring and Walker which presented their point of view. (Tr pp. 201, 202) With regard to the alleged pay off by cash and cocaine for false testimony in para I.B.6, Raaflaub never saw a transcript containing those facts, and did not remember hearing audio about cash or cocaine, but relied on Schubring and Walker. (Tr pp. 202-204) Raaflaub relied on Schubring and Walker to support the allegations in para

I.B.6 regarding alleged sexual favors provided by McLeod to Judge Grant. (Tr p. 205) Raaflaub knew that the allegations in P Exh 1 attempted to expand the trial record before the Court of Appeals. (Tr p. 210)

Raaflaub never contacted Judge Grant, Mutchler or McLeod to determine if they would deny the proposed allegations in P Exh 1 paras. I.B.1-14. (Tr p. 209) He did not review Schubring's amicus brief sent to the Court of Appeals on January 19, 1999, R Exh C tab 8. (Tr p. 227) Schubring's amicus brief did not raise any of the criminal allegations found in P Exh 1, filed March 28, 2000. (R Exh C tab 8)

Schubring testified that he did not personally investigate whether: Mutchler conspired with the court clerk to supply her with illegal drugs and cash (Tr pp 201, 202); that Mutchler conspired with Jane Doe to impersonate McLeod (Tr pp. 270, 271); that the Judge was having sex with McLeod (Tr pp. 277, 278); that the jury was being bribed (Tr p. 279); and that Mutchler conspired to revoke the probation of defendant. (Tr p. 282).

Schubring drafted P Exh 1 para I.B.6 with input from Walker. Raaflaub did not suggest any changes, amendments, deletions, or additions to paragraph 6. (Tr p. 299) Raaflaub was informed of the amicus brief, R Exh C tab 8, which did not have any allegations of criminal conduct by either the trial judge or the prosecutor. (Tr pp. 303-306) At a meeting, Raaflaub received a copy of the CD's containing all of the images for later viewing. (Tr pp. 306-308) With regard to the missing four pages of trial transcript, Schubring received the transcript from the former appellate attorney and Walker discovered four pages were missing because they were numerically missing from the copy received. (Tr pp. 312-318) Raaflaub never instructed Schubring to do any investigation. (Tr p. 323)

J.D. Walker testified that he did not prepare any of the paragraphs in P Exh 1, Motion for Rehearing. He was present when the motion was being prepared and answered questions from Schubring or Raaflaub. (Tr p. 454-457) Walker believed that the alleged conspiracies existed.

With regard to Formal Complaint paragraph 7 (1), P Exh 1, para I.B.12, relating to a conspiracy by Mutchler to obtain a false confession and to murder his son, Walker testified that Mutchler and P.O. Rogers had a conversation before a court session. This information came from the courtroom videotape after being electronically filtered by special equipment. (Tr p. 461-465) Those statements along with other alleged statements between Milt Munger and Katie Kuzmersky about an alleged plan to murder defendant were not transcribed. Walker claims the statements were picked up from the audio portion of the videotape. (Tr p. 465, 466)

Formal Complaint para 7(j), P Exh 1 para I.B.10, relates to the alleged conspiracy by Mutchler and sex offender Greg Bengry to extort funds from Target Inc. Walker claimed this allegation was based on conversations between Mutchler and P.O. Schuette in the courtroom. The conversations were not on the court transcript but were allegedly on the audio portion of the videotape. Walker did not have the videotape available at the hearing and he did not run the audio through noise filters for quality. He concluded that this was a conspiracy to extort money from Target. (Tr p. 466-469)

Formal Complaint para 7(i), P Exh 1 para I.B.9, relates to a conspiracy between Mutchler and P.O. Mike Brandt to extort $3 million from Target by threatening to rediscover exculpatory videotape evidence to exonerate defendant and to charge Jane Doe No. 1 with perjury. Walker could not recall who determined the amount of $3 million for the extortion and assumed John Doe No. 1 was affiliated with Target. (Tr p. 469-473, 480-484)

John Doe No. 1 in para 7(h), (g), P Exh 1 paras I.B.8, 7, relate to an alleged conspiracy between Mutchler and John Doe No. 1 to pay bribes to the judge and the jury. Walker based

those allegations on whispered conversations and a side bar conference, neither of which were on the trial transcript. Walker testified he picked up the conversations through the electronic filters. The tapes were not available at the hearing. (Tr p. 473-476)

During the criminal proceedings, Walker attempted to hire the law firm of Fieger and Schwartz to bring a civil action against Target Inc. That firm would not consider the case until Target either won or lost in the criminal matter. (Tr p. 486) Walker believed the alleged conspiracies kept his son from being exonerated from the criminal charges. He believed the Judge, prosecution, the key witness, and the police officers were all conspiring against his son. (Tr p. 488, 489)

Walker was asked by the Master to play segments of the audio from the trial videotapes. The first segment relates to the 4 pages of missing trial transcript, P Exh 1 para I.B.3, where it is alleged that Mutchler conspired with the trial judge and trial clerk to withhold evidence in the form of the missing pages. (Tr p. 520, 521) The revived pages say "videotape malfunction" but Walker says the term "fix the tape" can be heard. (Tr p. 522; R Exh C tab 9 p. 553) After playing the audio at the hearing, neither the Master, Nearing, counsel for Petitioner, nor Raaflaub heard the words, "fix the tape".

Another audio tape segment involved P Exh 1 para I.B.6, which states that Mutchler conspired with Jane Doe No. 1 to provide sexual favors to the trial judge. Walker claims to have heard the audio tape during the victim statement of McLeod where she said something to the effect of, "the court had put a lot of stress on her when came from screwing". Neither the Master, Nearing, counsel for Petitioner, nor Raaflaub heard any such statement. (Tr p. 524-528)

Walker could not remember whether the audio relating to the 4 missing pages and McLeod's victim statement was played for Raaflaub when the Motion for Rehearing, P Exh 1, was being prepared. (Tr p. 528, 529)

III. CONCLUSIONS OF LAW

A. Applicable Law - MRPC 8.2(a) and the First Amendment

The Respondent claims that statements made in his Motion for Rehearing filed in the Michigan Court of Appeals are protected by the First Amendment of the United States Constitution. The Court of Appeals affirmed the criminal assault conviction of his client. Application of a free speech defense in the politics of an election campaign for judgeships in Michigan is analyzed in In re Chmura, 461 Mich 517 (2000), herein (Chmura I); and, In re Chmura, 464 Mich 58 (2001), herein (Chmura II). First amendment issues have been analyzed in attorney discipline cases involving MRPC Rule 8.2(a) in Grievance Administrator v Fieger, ADB Case No. 94-186-GA, herein (Fieger II) decided September 2, 1997 and (Fieger III) decided May 3, 1999.

MRPC 8.2(a) prohibits attorneys from defaming judges, public legal officers, and candidates for judicial or legal offices. Under the general defamation standard, a citizen who defames a judicial or legal officer enjoys the benefit of the subjective "actual malice" test discussed by the U.S. Supreme Court in New York Times v Sullivan, 376 US 254, 84 S Ct 710, 11 L Ed 2d 686 (1964). Under this subjective test, "reckless disregard" is not based on what the reasonable speaker or publisher would have done, but rather upon the speaker's actual state of mind.

The Michigan Supreme Court rejected the actual malice standard for attorneys and adopted a more restrictive "objective test" for allegations of misconduct stemming from lawyer speech. Chmura I. Although Chmura I involved the Code of Judicial Conduct, the court used the language found in MRPC 8.2(a) to amend Canon 7 (B) (1) (d) to read: "should not knowingly, or with reckless disregard, use or participate in the use of any form of public communication that is false".

Fieger III, decided by the ADB on May 3, 1999, stated that the "subjective standard" shall be used in analyzing MRPC 8.2(a). The Michigan Supreme Court in Grievance Administrator v Fieger, Case No. 11478, 613 NW 2d 723 (2000), remanded Fieger III for reconsideration in light of Chmura I. This remand instructed the ADB to use the objective rather than the subjective standard in analyzing free speech as a defense to attorney misconduct.

Petitioner has the burden of showing by clear and convincing evidence that the statements contained in the subject Motion for Rehearing, filed in the Michigan Court of Appeals P Exh 1 paras I.B.1-14, are false. Chmura II, 464 Mich at 71-72; Fieger III, p 4.

Chmura I cites Standing Committee on Discipline of the United States Dist Court for the Central Dist of California v Yagman, herein (Yagman) 55 F 3d 1430 (9th Cir 1995) as a basis for adopting the objective standard. Yagman p. 1437 defines the objective standard as, "what the reasonable attorney, considered in light of all his professional functions, would do in the same or similar circumstances". The inquiry may take into account whether the attorney pursued readily available avenues of investigation. Yagman p. 1437, n13.

B. Application of Law to Facts

Rules 8.2 (a) states:

> A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicative officer, or public legal officer, or of a candidate for election or appointment to judicial or legal office.

As stated previously, this rule as construed by our Supreme Court does not incorporate the New York Times actual malice standard, but instead uses an objective standard. The free speech umbrella does not apply if Petitioner shows the statements made were false, and Raaflaub either knew they were false or made them with reckless disregard as to their truth or falsity.

Rule 8.2 (a) applies to Judge Grant and to Assistant Prosecutor Mutchler as a public legal officer.

The statements in the 14 paragraphs of P Exh 1, except 11 and 14, allege conspiracies to commit crimes of bribery, extortion, murder, obtaining a false confession, concealing or manipulating evidence, theft, delivering illegal drugs, and filing a false criminal complaint. The criminal trial judge is included in paragraphs 3, 6, and 8.

The First Amendment and MRPC 8.2 protect opinions and rhetorical hyperbole. "Opinions" are always protected by the First Amendment. However, some statements couched in the form of an opinion may contain factual connotations. If statements of opinion set forth the facts relied upon, and the facts are true or made after reasonable inquiry, the opinion is protected speech under the First Amendment. Statements which impute specific criminal acts are not entitled to free speech protection even if framed in opinion form, Yagman pp. 1440. None of the statements at issue herein can be viewed as hyperbole or opinion. They are, without exception, factual assertions.

Raaflaub relied on two biased individuals for facts, without any verification. The allegations are serious criminal conspiracies engaged in by the trial judge and the prosecutor. Raaflaub failed to conduct any independent inquiry(ies). Raaflaub failed to attempt to and/or to contact the judge, the prosecutor, or the victim before making the allegations set forth in the Motion for Rehearing. Raaflaub admits that P Exh 1 paras I.B.1-14 are factual and not hyperbole. (Tr pp. 236)

With respect to P Exh 1 para I.B.3, the existence of the alleged missing 4 pages of transcript are confirmed in endnote 3. A reasonable attorney would be aware that the allegations of para 3 are controverted in the endnote of the same motion and would not make serious criminal allegations under those circumstances.

A reasonable attorney would have reviewed Schubring's amicus brief mailed to the Court of Appeals, particularly since he was relying on Schubring and Walker to provide the allegations for the Motion for Rehearing. Schubring's amicus brief did not raise any issues regarding sex, drugs or money. At the hearing before the Master, Raaflaub admits he would not have filed his motion ". . . in this form . . .". (Tr pp. 215, 243, 244). A reasonable attorney would have verified the truth of the serious allegations before filing this motion.

Walker's son was convicted of felonious assault charges. Both Raaflaub and Schubring relied heavily on Walker to substantiate the outlandish allegations of criminal acts contained in the Motion for Rehearing. Walker, in turn, relied heavily on statements not captured or heard on tape or in the transcript, which no one else can hear, and which are not part of the criminal trial record. A reasonable attorney would not have found sufficient evidence to support the allegations contained in the Motion for Rehearing.

The criminal allegations in P Exh 1 I.B.1-14 are false. This is based on the uncontroverted testimony of Judge Grant, Mutchler and Heather McLeod.

Raaflaub made incredibly false statements by relying on a non-lawyer, Walker, who admits his bias. Walker, the father of defendant and living on social security disability income only, could lose civil claims against Target Inc. if his son's conviction survived. Raaflaub claims reliance on Walker and Schubring. Schubring points the finger at Walker. Walker, who knew Raaflaub for over one year before the motion was filed, shows himself as highly opinionated and drawing his conclusions without supporting facts.

A reasonable attorney would not have filed a Motion for Rehearing of the appeal of a criminal conviction without reviewing the record on appeal and without verifying the factual basis for alleged crimes. A review of the record before the Court of Appeals would have shown

the motion to be an improper attempt to enlarge the appellate record with serious criminal allegations against the trial judge and the prosecutor. Respondent violated MRPC 8.2 (a).

With regard to paragraph 10(a) of the Formal Complaint, I conclude that statements made in a pleading which are not well grounded in fact may give rise to discipline if an appropriate Rule of Professional Conduct (such as MRPC 3.1) is pled. I am unwilling to conclude that the Supreme Court, in adopting MCR 9.104(1)-(4) or other catch-all rules, intended a violation of MCR 2.114(D) to become a basis for discipline instead of, or in addition to, other Rules of Professional Conduct which could be charged.

As to paragraphs 10(b) and (c) of the Formal Complaint, I find that Raaflaub made the statements referenced therein; the statements alleging criminal conduct were false; and, the statements were made with reckless disregard as to their truth or falsity, i.e., that they were made without "a reasonable factual basis." Chmura 1, 461 Mich at 544.

IV. CONCLUSION

The First Amendment fails to protect Raaflaub's statements alleging that the trial judge and prosecutor conspired to commit crimes to insure that defendant would be found guilty of felonious assault. Raaflaub is guilty of attorney misconduct pursuant to MRPC Rule 8.2 (a).

The Master further concludes that MRPC 6.5 has not been violated. Any violation of MCR 2.114(D) which may exist is not a proper basis for discipline with MRPC 3.1 having not been charged in the Formal Complaint.

MILES A. HURWITZ (P15295)
Master
8283 North Telegraph Road
Dearborn Heights, MI 48127
(313) 278-7030

Dated: April 5, 2002

STATE OF MICHIGAN

ATTORNEY DISCIPLINE BOARD

Grievance Administrator,
Attorney Grievance Commission,
State of Michigan,

Petitioner,

v. ADB Case No. 01-94-GA

David H. Raaflaub, P-29975,

Respondent.
_____/

Washtenaw County Hearing Panel #1

Jerold Lax, Chairperson
Stefani A. Carter, Member
Thomas E. Dew, Member

DECISION OF HEARING PANEL
REGARDING DISCIPLINE

On April 5, 2002, Master Miles A. Hurwitz filed his report in this matter, concluding that the evidence supported the charge that Respondent, during the course of representing the defendant in a criminal matter, had violated MRPC 8.2(a), by filing a motion for rehearing in the Michigan Court of Appeals in which Respondent had made false accusations concerning a judge and prosecutor with reckless disregard as to the truth or falsity of those statements. In his report, the Master considered and rejected various constitutional challenges Petitioner had made to the imposition of discipline. On June 25, 2002, the panel adopted the Master's report and directed that a hearing be held on the appropriate discipline to be imposed.

A hearing concerning the level of discipline was held on August 8, 2002, at which time the Grievance Administrator suggested that the Respondent's conduct warranted discipline

APPENDIX C

ranging from 180-day suspension, which would require reinstatement before Respondent could again practice law, to a 3-year suspension, which would require recertification. The Grievance Administrator cited two Michigan Supreme Court cases (*In re Estes*, 355 Mich 411 (1959) and *In re Mains*, 121 Mich 603 (1899)) and two Attorney Discipline Board cases (*James A. Lepley* (1991) and *William A. Ortman* (1995)) which were alleged to be comparable to the present case and in which the penalties imposed ranged from suspension for a period requiring reinstatement to disbarment. The Grievance Administrator also suggested that a prior 1996 order of reprimand involving respondent constituted an aggravating factor.

Respondent reiterated his constitutional objections to the proceedings and to the imposition of discipline, attempted to distinguish the cases cited by the Grievance Administrator, and also offered as mitigating factors that his conduct involved no dishonest or selfish motive and that he was being treated for depression at the time of the incident. Further, Respondent suggested that the 1996 order of reprimand was too remote in time to constitute an aggravating factor.

The panel has considered the evidence presented and the authorities cited, as well as the American Bar Association Standards for Imposing Lawyer Sanctions. While the cited authorities have some relevance, the panel acknowledges that each case must be decided on its unique facts. Section 6.1 of the ABA standards, dealing with false statements, suggests that, in the absence of aggravating or mitigating circumstances, disbarment may be appropriate when an attorney has made a false statement with intent to deceive the court, and that suspension may be appropriate when a lawyer knows that false statements are being submitted. While the panel does not find sufficient evidence of an intent to deceive, the panel does find that Respondent's reckless disregard of the truth or falsity of his statements warrants suspension, and that

suspension of a length requiring reinstatement is warranted by the facts. Neither the aggravating or mitigating circumstances brought to the panel's attention are sufficient to result in modification of the penalty which would otherwise be imposed.

Based upon the foregoing, it is the unanimous determination of the panel that Respondent be suspended for a period of 180 days.

Jerold Lax, Chairperson

Date September 26, 2002