STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellant-Cross Appellee,

v

G. Scott Stermer, P 26813,

Respondent/Appellee-Cross Appellant,

Case Nos. 00-206-AI; 01-3-JC

Decided: May 27, 2003

Appearances:
Patrick K. McGlinn, for Grievance Administrator, Petitioner/Appellant-Cross Appellee
James J. Zimmer, for the Respondent/Appellee-Cross Appellant

BOARD OPINION

The respondent, G. Scott Stermer, pled guilty on November 22, 2000 to the felony of uttering and publishing, in violation of MCL 750.249. The respondent's plea was based upon his forgery of a court order in an attempt to deceive a district court judge as to the true status of his client's driving record. In that criminal matter, the respondent was sentenced to probation for 18 months and ordered to pay fines and costs of $420. In the discipline proceedings based upon that conviction, a hearing panel of the Attorney Discipline Board ordered the suspension of the respondent's license to practice law for a period of three and one-half years (42 months). The Grievance Administrator petitioned for review on the grounds that revocation of the respondent's license is called for under a proper application of the American Bar Association's Standards for Imposing Lawyer Sanctions. The respondent also petitioned for review on the grounds that mitigating circumstances present in this case warrant his suspension for no more than two years followed by a period of probation.

The Attorney Discipline Board has conducted review proceedings in accordance with MCR 9.118. For the reasons discussed below, we vacate the hearing panel's order of suspension and order the revocation of the respondent's license to practice law effective November 22, 2000, the date of his felony conviction.

I. Panel Proceedings

The respondent was sentenced in the Genesee County Circuit Court on November 22, 2000. Under the terms of a plea agreement which had been worked out in advance, he agreed to plead guilty to the felony of uttering and publishing and he waived his right to challenge any legal or factual issues. He was sentenced to 18 months probation, with no jail time. In accordance with MCR 9.120(B)(1), the respondent's license to practice law was automatically suspended on November 22, 2000, the date his plea was accepted by the court. The Grievance Administrator filed a certified copy of the judgment of conviction on January 9, 2001 and the matter was assigned to a hearing panel in Genesee County for proceedings in accordance with MCR 9.120(B). During the panel proceedings, there was no dispute as to the validity of respondent's criminal conviction nor has the respondent denied engaging in the conduct which resulted in his conviction. The proceedings before the panel largely concerned evidence pertaining to aggravating or mitigating circumstances which might have a bearing on the level of discipline. Specifically, the parties offered testimony from medical experts regarding the respondent's diabetes and blood sugar levels as factors which may or may not have affected his ability to make sound judgments at the time of his misconduct. In addition, the respondent presented evidence of his otherwise untarnished reputation in the legal community.

The record in this case discloses that the respondent was admitted to practice law in Michigan in 1976. He began his legal career in the office of the prosecuting attorney in Tuscola County and in 1978, he became the chief assistant prosecutor. He was appointed to the position of prosecutor in 1983 and he was elected to that office in 1984. In 1986, the respondent moved to Mt. Morris where he opened what he described as a "neighborhood law office" handling domestic relations, wills and estates, and criminal and traffic matters.

In the mid to early 1990s, the respondent represented Terrance Wagner in a divorce case. He then represented Mr. Wagner in other matters, including an OUI (drunk driving) charge in the 67th District Court. In that case, Mr. Stermer was able to negotiate the charge down to reckless driving with the further condition that his client's plea would be taken under advisement. Mr. Wagner was to return to the court in April 1999. If there were no further blemishes on his driving record, then the matter could be further reduced to careless driving. However, Mr. Wagner was

arrested again for drunk driving in February 1999 and that case was assigned to the 68th District Court.

In March 1999, the respondent appeared before 67th District Court Magistrate Roberta Wray for the review of Mr. Wagner's plea under advisement. The Magistrate noted that it appeared that Mr. Wagner had some sort of recent problem in the 68th District Court. Magistrate Wray testified to the panel that Mr. Stermer told her that he thought that the newer matter could be resolved within a week. The review date on the older case was therefore rescheduled for April 13, 1999. Mr. Stermer attempted, without success, to negotiate a reduction in the new matter.

Mr. Wagner appeared at respondent's office on the morning of April 13, 1999, the day they were scheduled to go before Judge Larry Stecco for the review hearing in 67th District Court. Respondent testified to the panel:

> I told [Wagner] that the only way that I saw that he could avoid the reckless driving conviction would be for me to present some type of documentation for Judge Stecco that would indicate that the case in Flint 68th Court had been dismissed, and, therefore, they could go ahead and enter the conviction for careless driving, and that would resolve that issue as far as his suspension. [Tr 10/03/01, pp 107-108.]

At this meeting, the respondent told Wagner that if the judge asked for an explanation as to the reason for the dismissal in 68th District Court, that the best explanation he could think of was for Wagner and/or respondent to tell Judge Stecco that Wagner had a brother, "Randolph" Wagner who had used Terrance Wagner's driver's license without permission and that the once the impersonation was straightened out, the 68th District Court had dropped the charge against Terrance. It should be noted that Terrance Wagner does not have a brother and the respondent candidly admitted to the panel that <u>he</u> devised that story, not his client. At some point during this meeting, Wagner told respondent that he did not want to accompany respondent to court that morning. (The record is not entirely clear as to Wagner's reason for not accompanying his lawyer to the court hearing and Mr. Wagner was not called as a witness before the panel.)

After his meeting with Mr. Wagner, the respondent deliberately crafted a fake order to take with him for the review hearing before Judge Stecco. He told the panel:

> The morning of the 13th, I, after meeting with Mr. Wagner, I hastily put this together. I printed it off of my personal computer, and essentially what I did was I took an old order that I had that had Judge McAra's stamp along with the clerk's stamp on it, and just

> photocopied that off onto this order here. And you can, the reason I say "hastily done," is because the case in 68th did not involve Judge McAra. That was the first one that I came across that had a 68th stamp. So I did that sometime between 9:00 and 10:30 in the morning. [Tr 10/03/01, pp 109-110.]

At 9:50 that morning, the respondent appeared in Mt. Morris before 67th District Judge Larry Stecco. A transcript of that short hearing is in the record. (Exhibit 3.) Judge Stecco recounted for the record that the computer had turned up a new driving related offense at the last hearing. Judge Stecco asked respondent about that:

MR. STERMER: That was–he was charged of OUIL but that was dismissed. Apparently his brother impersonated him. Used his name and date of birth.

THE COURT: Then was his brother charged?

MR. STERMER: Yes.

THE COURT: And his brother's name is?

MR. STERMER: Randolph.

THE COURT: Wagner?

MR. STERMER: Yes. At least I assume he is. The City Attorney's office is handling that in Flint.

THE COURT: Is this copy for me or is this your file copy?

MR. STERMER: You can have that.

THE COURT: Is Mr. Wagner here?

MR. STERMER: No, Judge, he's off ill today. His girlfriend dropped off his driver's license for me so I could show the court.

THE COURT: Okay. And he's admitting responsibility to Careless Driving?

MR. STERMER: That's correct.

THE COURT: When will he be available to come in? I want him in court. Because of this confusion I'm gonna take some testimony from him.

MR. STERMER: Okay. Is the Court gonna be here Friday?

THE COURT: Oh, yeah. Downtown? Next week every day except Wednesday which–just bring him in one of those days.

MR. STERMER: All right. (Exhibit 3, pp 3-4.)

Judge Stecco testified that while he had no reason to doubt the validity of the supposed order from Judge McAra, the case was unusual enough that he called Judge McAra. The respondent's deception was soon revealed and within a day or two the respondent was contacted by a detective from the Michigan State Police. The respondent informed Mr. Wagner that he could no longer represent him and he sought the advice of an attorney. The law enforcement/prosecution officials who handled the case testified that respondent was cooperative and straightforward. The plea bargain they worked out involved a plea to the crime of uttering and publishing, which carries a recommended sentence in the range of zero to six months in jail. The respondent was sentenced by Genesee County Circuit Judge Geoffrey Neithercut to a term of probation for 18 months. (The transcript of Judge Neithercut's deposition was received by the panel as Exhibit 4.)

II. Evidence Offered in Mitigation

The respondent concedes that, in the absence of mitigating factors, his acts of forging a court document and making a wilful misrepresentation to a court would fall under sections 5.11 and 6.11 of the ABA Standards and that such conduct would generally warrant the revocation of his license. Throughout these proceedings, the respondent has placed great reliance on the testimony of his medical witnesses who testified to the diagnosis of his diabetes in March 1999, his subsequent efforts to control his blood sugar levels, and the possible and/or likely effect on his judgment at the time of his misconduct.

The respondent presented the testimony of Dr. Mark Trudell, his physician since 1992. In late February 1999, Dr. Trudell conducted some tests which were discussed with respondent on March 6, 1999. They showed an elevated blood sugar level of 305. (Dr. Trudell testified that normal is in the range of 70 to 115.) He started respondent on Glucophage, to control the blood sugar, on March 10, 1999. Subsequent blood tests indicated blood sugar levels above 200 during April and early May 1999; at 198 on May 8, 1999; 120 on May 22, 1999 and 111 on October 23, 1999. During this period, respondent's Glucophage medication was increased from 1000 mg per day to 2000 mg per day because the original dosage did not control the elevated blood sugar. Dr.

Trudell testified that he had treated a number of patients with diabetes and that "some" of these patients had exhibited anxiety or emotional problems (Trudell Dep Tr p 10). However, Dr. Trudell was unable to say that he had any specific recollection, or had made any specific notations, of such a problem with Mr. Stermer during the Spring of 1999. Similarly, Dr. Trudell was willing to say that fluctuations in blood sugar levels of the type shown on Mr. Stermer's charts "could" have an effect on how an individual might feel but he offered no testimony specifically dealing with Mr. Stermer's feelings or moods.

The respondent also presented the testimony of Walter R. Drwal, LLP who met with the respondent on five occasions between June 14th and July 8, 2001 for the purpose of determining a personality profile and to determine "if sustained high blood sugar (hyperglycemia) would impact decision making." (Drwal report Exhibit 3). The report reflects that the evaluation was conducted more than two years after the conduct in question and therefore deals to a large extent with the respondent's personality and decision making traits as of June 2001, not April 1999. A portion of the report includes his summaries of the works of others expressing opinions that chronic high glucose levels "are associated [with] impaired thinking," and that "untreated diabetes render decision making skills to a functioning level that might best be described as 'impaired'." The examiner also came to the conclusion that, given the consequences visited upon Mr. Stermer to date, it is unlikely that he would repeat such conduct in the future.

A somewhat different view is found in the deposition of the Grievance Administrator's expert, Elissa Benedek, M.D. Dr. Benedek is Clinical Professor of Psychiatry at the University of Michigan, Michigan State University and Wayne State University. She had no direct contact with the respondent but she reviewed Mr. Stermer's medical records and the depositions of Dr. Trudell and Mr. Drwal. She testified that, in her opinion, impulse control would not be impaired by elevated blood sugar and she testified that depression is not a common side effect of diabetes. Under cross examination by respondent's attorney, Dr. Benedek repeated her belief that diabetes alone would not have a significant impact upon an individual's ability to appreciate wrongful conduct or cause that person to act impulsively. (Benedek Dep Tr p 21.)

Virtually the only testimony in the record linking the respondent's medical condition to his conduct on April 13, 1999 came from the respondent's wife, Susan Stermer, who testified that in the Spring of 1999, her husband was exhibiting "lots of fatigue, lots of anxiety, lots of irritability." (Tr

04/24/02, p 164.) She testified specifically with regard to a family trip in February 1999 where her husband exhibited some behavior which she described as totally out of character.

The respondent also presented evidence regarding his previously untarnished reputation in the legal community in testimony from Flint attorneys James Whalen, Bruce Doll and Michael Manley as well as Tuscola County Circuit Court Judge Patrick Joslyn. These witnesses testified that they had professional dealings with the respondent prior to April 1999 and believed that he had been honest and forthright. Both Judge Joslyn and Mr. Manley, although professing no medical expertise, expressed their lay opinion that the respondent's conduct was so out of character that it may well have been related in some way to respondent's diabetes.

III. Hearing Panel Report on Discipline

In its report, the hearing panel was careful to emphasize that it did not consider the respondent's diabetes as an excuse for his conduct. And, while the panel recognized his disability as a physical impairment which could constitute a mitigating factor under ABA Standard 9.32 (h), the panel stopped short of describing it as the only, or even the most significant, mitigating factor. The panel's report also identifies the mitigating effect of a reputation for good character in the legal community, a prior unblemished record and remorse for his conduct.

The hearing panel was cognizant of the nature of the respondent's misconduct, saying:

> The public, the courts and the legal profession all suffer incalculable harm when a lawyer who has been sworn as a officer of the court practices a deception on the court. In this case, the attorney who practiced this deception was not only an experienced attorney but had served the legal system as a prosecuting attorney. [Panel report, p 6.]

The panel acknowledged the aggravating effect of a pattern of misconduct and/or the existence of multiple offenses but noted that respondent's conduct occurred in a very short period of time in what was apparently an otherwise unblemished career. In announcing its decision to impose a suspension of three and one-half years, the panel stated:

> We cannot 'weigh' the aggravating and mitigating factors in this case with precision. While it is clear that this lawyer did not properly discharge his obligation to the public, the legal system and the legal profession, it is less clear that he will never again be able to discharge those obligations. [Panel report, p 6.]

III. Discussion

It is undisputed in this case that analysis of the respondent's conduct under the ABA Standards for Imposing Lawyer Sanctions as mandated in Grievance Administrator v Lopatin, 462 Mich 235; 612 NW2d 120 (2000), leads to the applicability of ABA Standards 5.11 and 6.11. Absent aggravating or mitigating circumstances, ABA Standard 5.11 declares:

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

ABA Standard 6.1 deals with false statements, fraud or misrepresentation by an attorney. Absent aggravating or mitigating circumstances, Standard 6.11 states:

> 6.11 Disbarment is generally appropriate when a lawyer, with the intent to deceive the court, makes a false statement, submits a false document, or improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding.

The respondent forthrightly acknowledges that he engaged in conduct which falls under both Standards. He argues, however, that disbarment for such conduct is not automatic but is "generally" appropriate and then, only upon a careful balancing of the applicable aggravating and mitigating circumstances.

In our examination of the potentially mitigating factors in this case, we must state that we are able to give little weight to the mitigating effect of the respondent's diabetes or his ongoing attempts at the time of the misconduct to control his blood sugar levels. Simply stated, a causal connection between the respondent's physical condition and the misconduct which occurred here

has not been established. The respondent's own treating physician, Dr. Trudell, was clearly unwilling to make such a connection. Moreover, it appears that the largely conjectural testimony of respondent's witness, Walter Drwal, was refuted in large part by the Grievance Administrator's expert, Dr. Benedek.

As amended in 1992, ABA Standard 9.32 (factors which may be considered in mitigation) recognizes physical disability as a mitigating factor (Standard 9.32(h)) while mental disability or chemical dependency are recognized under 9.32(i) only if there is medical evidence that the respondent was affected by the dependency or disability and the respondent has demonstrated a sustained period of successful rehabilitation. In 1992, the following language was added to the comment:

> Issues of physical and mental disability or chemical dependency offered as mitigating factors in disciplinary proceedings require careful analysis. Direct causation between the disability or chemical dependency and the offense must be established. If the offense is proven to be attributable solely to a disability or chemical dependency, it should be given the greatest weight. If it is principally responsible for the offense, it should be given very great weight; and if it is a substantial contributing cause of the offense, it should be given great weight. In all other cases in which the disability or chemical dependency is considered as mitigating, it should be given little weight. [Emphasis added.]

The Grievance Administrator's point is well taken that there is scant evidentiary support for a finding of a direct causal connection between the respondent's elevated and/or fluctuating blood sugar levels and his serious wilful misconduct.

We agree with what we perceive to be the panel's conclusion that somewhat greater weight may be given to the respondent's otherwise unblemished record as an attorney and his previous reputation in the legal community. However, we cannot escape the fact that, by its peculiar nature, the respondent's conduct must be considered at all times in terms of the following question: Is there, as a general proposition, any conduct by an attorney more egregious than forging a court document bearing the name of one judge for the purpose of deliberately deceiving another judge? A review of prior Board decisions in cases involving an attorney's preparation of false documents is relevant to our consideration of that question.

In a 1985 case, the Board increased a two year suspension to disbarment in Matter of Anthony B. Meisner, DP 75/83 (ADB1985). The fifteen-count complaint in that case charged that the respondent lied to clients regarding the status of their cases and submitted forged documents to several of them, including copies of complaints alleged to have been filed and a forged report of a military officer in connection with respondent's representation of a sailor charged with going AWOL.

In Matter of Mary E. Gerisch, ADB 171-87 (ADB 1988), the respondent falsely advised a client that a civil case had been settled. To aid in the deception, she sent the client a copy of a check and "settlement agreement" purportedly signed by the defendant. Both documents were forgeries. In that case, the Board increased the three year suspension ordered by the hearing panel to disbarment, noting that:

> An attorney who created forged pleadings or documents not only destroys the trust of the client but does incalculable harm to the legal system. Clients, court officers and other lawyers who receive pleadings or documents from a lawyer should never have to question the document's authenticity . . . 'Truth is the cornerstone of the judicial system and the practice of law requires an allegiance and fidelity to truth.' Office of Disciplinary Counsel v Wittmaack, No. J-245-1986, PA S.Ct. 311-87 . . . We believe that revocation of the license to practice law is an appropriate sanction when an attorney violates the fundamental obligation to be truthful. This would seem to be especially true when a deliberate calculated intent to deceive is evidenced by the preparation of a forged document.

Although presenting somewhat similar facts, the case of Grievance Administrator v Leo C. Gilhool, ADB 155-88 (ADB 1989) resulted in the Board increasing discipline from a nine month suspension to a suspension of four years. In Gilhool, the Board stopped short of revocation in light of mitigating factors, including his restitution of $30,000 to the client.

In 1983, the Board considered Grievance Administrator v John D. Hagy, DP 153/82; DP 66/82 (ADB 1983). That respondent lied to four bankruptcy clients by telling them that he had filed petitions on their behalf. A fifth client relied upon a forged divorce judgment which was presented to conceal the respondent's neglect of her case. Although the Board cited the mitigating effect of respondent's youth, inexperience, lack of professional guidance and heavy case load, the 100-day suspension imposed by the panel was set aside and respondent was suspended for two years.

We are not unmindful that the Attorney Grievance Commission recently recognized that discipline less than revocation may be appropriate in a case involving an attorney's plea of guilty to the federal crime of forging the signature of a United States Bankruptcy Judge in violation of Title 18 USC 505 as evidenced by the Commission's approval of a stipulation for a consent order calling for a three year suspension in light of specifically enumerated mitigating factors in Grievance Administrator v Kenneth R. Rastello, Case No. 01-159-JC.[1]

In the final analysis, we return to the question posed above. What attorney conduct is more egregious than deliberately forging and presenting a court order? To that question we add another: In the absence of mitigating circumstances which are both compelling and clearly established, what is the message we send to the public, the courts and the legal profession by imposing discipline less than revocation for such misconduct?

Like the panel below, it is difficult for us to comprehend why the respondent committed, in one brief period of time, misconduct so out of character. Nevertheless, after considering all of the facts and circumstances in this case and analyzing the questions posed above, we are compelled to conclude that proper application of the ABA Standards, consideration of prior opinions of the Board, and recognition of the egregious nature of the misconduct itself must result in the entry of an order revoking the respondent's license to practice law.

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

Board members Marie E. Martell and Hon. Richard F. Suhrheinrich did not participate.

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[1] We emphasize that the three year suspension by consent in Rastello is not cited as precedent. Just because one individual case presents unique and compelling mitigating circumstances warranting approval of a consent discipline proposal does not mean that the appropriate range of discipline is lowered in subsequent, contested cases. The Grievance Administrator's willingness to consent to a three year suspension in Rastello is not inconsistent with the position he takes here. Unlike Rastello, the Administrator does not concede that compelling mitigation is present in this case.