STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellee/Cross-Appellant,

v

Che A. Karega, P-31387 ,

Respondent/Appellant/Cross-Appellee,

Case No. 00-192-GA

Decided: September 30, 2002

Appearances:
Ruthann Stevens, for Grievance Administrator, Petitioner/Appellee
Robert H. Golden, for the Respondent/Appellant

BOARD OPINION

I. Introduction

Based upon the evidence presented, the hearing panel concluded that the respondent, Che A. Karega, engaged in professional misconduct characterized by the panel as failure to provide competent representation to a client in a criminal matter; failure to adequately communicate with his client and the client's family; and failure to provide adequate information to the client and the client's family regarding the nature of the representation and the fee arrangements to the extent necessary to allow the client to make informed decisions regarding the continuation of that representation. The panel conducted a separate hearing on discipline and, in consideration of all of the aggravating and mitigating factors, concluded that the respondent's license to practice law in Michigan should be suspended for a period of 150 days. The respondent and the Grievance Administrator petitioned the Attorney Discipline Board for review of the hearing panel's decision. For the reasons discussed below, the hearing panel's order of March 22, 2002 is affirmed.

II. Procedural History

The respondent was retained on June 9, 1999 to represent Latasha Morson who was charged with various felony counts as the result of a shooting which occurred in Ferndale, Michigan. These

charges included conspiracy to commit armed robbery, armed robbery, carrying a concealed weapon and use of a fire arm in the commission of a felony. Prior to June 9, 1999, the respondent accepted a cash payment of several hundred dollars to visit Ms. Morson in jail. On June 9, 1999, Ms. Morson's grandmother paid $1,000 to the respondent's legal assistant and was given a receipt for a "part retainer". The respondent then filed his appearance on behalf of Latasha Morson in the 43rd District Court (Ferndale). That written appearance, dated June 11, 1999, includes the handwritten notation "Preliminary only" (Respondent's Exhibit 1). On July 8, 1999, the respondent appeared with Ms. Morson at the Ferndale District Court for her preliminary examination where he received an additional payment of $500 from another of Ms. Morson's relatives. At the conclusion of that hearing, Ms. Morson was bound over for trial in the Oakland County Circuit Court. There is no dispute that the respondent took no further action on Ms. Morson's behalf. After the preliminary examination on July 8, 1999, there were no written communications from the respondent to the Ferndale District Court, the Oakland County Circuit Court, or the Oakland County prosecutor.

Ms. Morson's mother, Peggie A. Bell, filed a request for investigation with the Attorney Grievance Commission. At the conclusion of the investigation, the Grievance Administrator filed a formal complaint with the Attorney Discipline Board on November 17, 2000. The respondent filed an answer and appeared before the panel at the public hearing conducted in Southfield on June 12, 2001. He did not, however, file a response to the Grievance Administrator's discovery demand as required under MCR 9.115(F)(4) and, other than presenting his own testimony, he did not call any witnesses to testify on his behalf.

At the panel hearing, respondent testified that he and his legal assistant (now wife), Hildred Ross, discussed a total fee of $10,000 to defend Latasha Morson against the criminal charges. He acknowledged that he did not personally convey this fee agreement to Ms. Morson or any member of her family but that he "assumed" that his legal assistant discussed this figure with Ms. Morson's family. Mr. Karega testified that he does not personally involve himself in fee discussions, likening his actions to those of a doctor who provides medical care while letting his or her staff take care of such matters as billings and insurance reimbursements. It is undisputed that there was no written fee agreement in this case, no written explanation of the fee arrangement, and no written demand for additional fees. The complainant, Peggie Bell, freely acknowledged that she did not think that the $1,500 paid to respondent represented the entire legal fee for his continued representation of Latasha Morson once the case was bound over. (T 83). She testified, however, that although the

respondent set a date and time to meet with her to discuss his continued representation, the respondent did not appear at that meeting (T 79-80). According to Ms. Bell, a second meeting was arranged and, again, the respondent did not attend (T 85-86).

In its report, the panel found,

> Succinctly stated, when Respondent Karega failed to receive the Eight Thousand Five Hundred Dollar ($8,500.00) balance of his retainer from Ms. Morson's family, or an executed agreement to pay an additional Eight Thousand Five Hundreds ($8,500.00), he unilaterally, and without notice to anyone, disassociated himself from the case.

The hearing panel found that the respondent violated most, but not all, of the Michigan Rules of Professional Conduct charged in the complaint. Specifically, the panel found that the respondent violated Michigan Rules of Professional Conduct 1.1(c) [neglect of a legal matter]; 1.4(a) [failure to keep a client reasonably informed]; 1.4(b) [failure to explain a matter to the extent reasonably necessary to permit the client to make informed decisions] and 8.4(a) [conduct which violates the rules of professional conduct]. The panel concluded that once respondent Karega undertook to represent Ms. Morson, he could not simply walk away from the case when he did not receive the full fee which he may or may not have discussed with his client. The panel found that the testimony from Ms. Morson's mother, buttressed by the testimony of other witnesses, was credible on the subject of the respondent's failure to advise them of the full fee which he had in mind, the nature of the services which he expected to provide and the consequences if the fees were not paid. In its report, the panel repeatedly emphasized the respondent's abject failure to communicate with Ms. Morson or her family to the extent necessary to keep his client reasonably informed about the status of her legal matter. The panel noted respondent's position that he delegated fee issues to members of his staff, but concluded that respondent was ultimately responsible for the lack of communication.

The panel also reported, however, that the evidence presented did not support a finding that the respondent had violated other rules as charged in the complaint. Specifically, the panel rejected the claims that respondent's conduct constituted violations of MRPC 1.2(a) [failure to seek the lawful objectives of a client]; 1.16(b) [improper withdrawal from representation]; and 8.4(c) [engaging in conduct prejudicial to the administration of justice].

Following its consideration of the arguments on the issue of misconduct, the panel took a short recess, then returned to announce its decision on the record that the charges of misconduct relating to competence and communication had been established and that the panel was prepared to proceed directly to the separate hearing on discipline which is required under MCR 9.115(J)(2). Both parties were given an opportunity to give a brief description of the evidence which they intended to offer during the second phase of the hearing. Counsel for the Grievance Administrator stated that she was prepared to offer documentary evidence pertaining to the respondent's prior disciplinary history. The respondent requested an adjournment in order to produce witnesses to testify as to the manner in which he conducts his law practice.

> I'm speaking more of judges and people who have known me, not any one particular case. I feel that I would like to have the matter adjourned to a certain date so I could present the extenuation of mitigating circumstances. [T 113.]

After another brief recess, the panel chairperson advised the parties:

> CHAIRMAN MARTENS: Back on the record. Mr. Karega, we're going to take under advisement your motion to adjourn. For the moment, we're going to proceed. The parties were fully noticed of the nature and the scope of the proceedings which included potential hearing on disciplinary action in the event of finding of misconduct.
>
> MR. KAREGA: I understand. [T114.]

Following the Administrator's presentation of evidence of respondent's prior disciplinary history, including admonitions issued by the Attorney Grievance Commission, and the respondent's testimony to the panel regarding certain factors to be considered in mitigation, the panel chairperson addressed the respondent's request for an adjournment:

> CHAIRMAN MARTENS: Mr. Karega, you've got to be aware that you're facing potential possibility of serious disciplinary action.
>
> MR. KAREGA: Yes, I am.
>
> CHAIRMAN MARTENS: And for that reason, we're frankly reluctant, although we believe you've had ample notice of the full scope of these proceedings today, we're reluctant to foreclose you from the possibility of presenting any evidence in mitigating [sic] or defense. The question of the extent of your disciplinary action, I must tell you candidly we're not going to be much effected by long

tributes from happy clients. I'm sure there have been cases you've handled successfully without incident.

What we propose to do is this. What we want from you by the first of July is a brief explaining what you propose to present if we have a further hearing on this phase of the proceeding. We want you to explain what evidence you intend to present and how you expect it should effect our decision on discipline.

MEMBER SAWYER: I would think he should give us names, what they're going to testify to in the brief.

MS. STEVENS: Should I file a response within two weeks if I have any objection to anything that he wants to present?

CHAIRMAN MARTENS: Well –

MEMBER SAWYER: If she wants to.

MS. STEVENS: I have no idea what he's going to present. I just want the opportunity to kind of respond if there's anything I think is –

CHAIRMAN MARTENS: We'll, I have to give you an opportunity to respond.

MEMBER HARNISCH: I think we've got to make it July 2 because I believe July 1 is a Sunday. We'll make it July 2.

CHAIRMAN MARTENS: Make it July 2.

MS. STEVENS: Can I respond by the 16th? Is that okay?

MEMBER SAWYER: Mr. Karega, I just want to make a comment in connection with this proposal we made. I think we all agree that well, the Chairman has already said, Mr. Martens has already said we don't want you parading in a bunch of clients saying how well you did. We don't want a bunch of judges. We don't want to hear about what a good lawyer you are, what a good guy you are. I think you probably are a good lawyer for the most part. We can tell you're a good guy. We want, I guess what we want to see is the mitigation. It doesn't help us, tell me if I'm wrong, but it doesn't help us to hear a bunch of people coming in saying what a wonderful guy you are because you made some mistakes. We need to see, you know, any other explanations you've got for what you've done and probably

> what you think you can do, what steps you can take to assure that this is, that we can be assured this is not going to happen again. Is that –
>
> CHAIRMAN MARTENS: I hope that gives Mr. Karega a reasonable understanding –
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> MR. KAREGA: It does.
>
> CHAIRMAN MARTENS: – of what it is we want to know in this brief that would be due in my hands by July 2nd. Do you have the addresses, the full name and address of each of the panel numbers [sic]?
>
> MR. KAREGA: Yes, I do.
>
> CHAIRMAN MARTENS: Well, then, I'll put the burden on you of sending to all three of us a copy of this brief you're going to present, and, of course, to Ms. Stevens.
>
> MR. KAREGA: Thank you.
>
> CHAIRMAN MARTENS: All right. Then we're adjourned.
>
> MS. STEVENS: Thank you.
> (Hearing concluded at 2:04 p.m.) [T 140-144.]

The record discloses that the respondent did not file a brief or witness list by July 2nd as directed by the panel. On July 9, 2001, respondent Karega did file a "Memorandum in Support of Extenuating and Mitigating Circumstances" which was accompanied by the following documents: a brochure prepared by the Karega Law Firm, P.C. for distribution to criminal defendants; two samples of blank "Criminal Fee Agreements"; a copy of a letter dated May 2001 from Harvard College to respondent's daughter congratulating her on her academic achievements and encouraging her to consider Harvard as a possible college choice; a copy of a letter dated May 17, 2001 from Harvard Law School to another of respondent's daughters offering her the option to be included on that school's wait list; and a letter dated June 18, 2001 from the "National Honor Roll" offering to place the respondent's high school age son in that organizations national directory. Referring to the achievements of his children, respondent concluded his July 9th memorandum by stating:

> Please be advised that I am not talking about my children to elicit sympathy from the Panel, but, only to give a more complete picture of myself. As mentioned previously, whatever I say does not excuse

> my failure to get my client's or the court's permission to withdraw from Ms. Morrison's [sic] case. However, rearing seven productive people should count for something.

The respondent's July 9, 2001 Memorandum in Support of Extenuating and Mitigating Circumstances did not request a further hearing to present evidence and did not provide the names of additional witnesses or an explanation of what they would be expected to testify to.

On March 22, 2002, the hearing panel filed its report and order setting forth its reasons for imposing a suspension of the respondent's license to practice law for 150 days. The respondent petitioned for review of the panel's order on the grounds that his limited appearance in the district court for the purpose of participating in the preliminary examination only relieved him of further professional responsibility after that hearing and that the hearing panel's findings of misconduct where therefore erroneous. The respondent's request for a stay of the hearing panel's order was granted automatically in accordance with MCR 9.115(K).

The Grievance Administrator filed a petition for review on the grounds that the hearing panel erred by imposing a suspension of less than 180 days. Both parties filed briefs in support of their respective petitions for review and presented arguments to the Board at a hearing conducted on June 19, 2002.

III. Discussion

A. The Hearing Panel's Findings of Misconduct

In reviewing a hearing panel decision, the Board must determine whether the panel's findings of fact have "proper evidentiary support on the whole record." Grievance Administrator v August, 438 Mich 296, 304; 475 NW2d 256 (1991). See also, Grievance Administrator v T. Patrick Freydl, 96-193-GA (ADB 1998). "This standard is akin to the clearly erroneous standard [appellate courts] use in reviewing a trial court's findings of fact in civil proceedings." Grievance Administrator v Lopatin, 462 Mich 248 n12 (2000) (citing MCR 2.613(C)).

Because the hearing panel has the opportunity to observe the witnesses during their testimony, the Board defers to the panel's assessment of their demeanor and credibility. Grievance Administrator v Neil C. Szabo, 96-228-GA (ADB 1998); Grievance Administrator v Deborah C. Lynch, No. 96-96-GA (ADB 1997). See also In re McWhorter, 449 Mich 130, 136 n 7 (1995).

In short, "it is not the Board's function to substitute its own judgment for that of the panels' or to offer a *de novo* analysis of the evidence." Grievance Administrator v Carrie L. P. Gray, 93-250-GA (ADB 1996), lv den 453 Mich 1216 (1996).

In applying that standard of review in this case, the Board has been careful not to lose sight of the nature of the misconduct actually found by the hearing panel. In their respective briefs, the parties have forcefully argued as to the applicability of MCR 2.117(C) which governs the duration of an attorney's formal appearance on behalf of a client. That subrule states:

> (C) Duration of Appearance by Attorney.
>
> (1) Unless otherwise stated or ordered by the court, an attorney's appearance applies only in the court in which it is made, or to which the action is transferred, until a final judgment is entered disposing of all claims by or against the party whom the attorney represents and the time for appeal of right has passed. The appearance applies in an appeal taken before entry of final judgment by the trial court. [Emphasis added.]

According to the Grievance Administrator, the respondent's written appearance on behalf of Latasha Morson for the preliminary examination in the district court obligated him to continue that representation in the subsequent felony proceedings once the case was bound over to circuit court for trial since the bind-over to circuit court constituted a transfer of the action within the meaning of that subrule.

On the contrary, claims the respondent, MCR 2.117 (C) is a rule of civil procedure applicable to civil proceedings only. He argues on appeal that not only did he file a "limited appearance" in the district court, but that "custom and practice" dictates that a new appearance must be filed in the circuit court when a felony case is bound over for trial.

Neither party has cited authorities in support of their respective arguments as to the interpretation or applicability of MCR 2.117(C) in a felony matter nor was testimony offered by either party as to the "custom and practice" in such cases.

While this question argued by the parties is an interesting one, its resolution is not necessarily required by the Board. A careful reading of the hearing panel's report makes it clear that the misconduct for which respondent was disciplined by the hearing panel was not his non-appearance in the Oakland County Circuit Court on behalf of Ms. Morson nor his failure to withdraw from representation after her case was bound over for trial. Rather, the hearing panel

found that the respondent's misconduct arises from his failure to communicate the nature and extent of his representation to his client and/or members of her family.

Contrary to the respondent's statement in the brief in support of his petition for review, the panel did not find that the respondent "violated all of the alleged rules." In fact, the panel dismissed the charges that the respondent failed to seek his client's lawful objectives in violation of MRPC 1.2(a); that he improperly withdrew from his representation of Ms. Morson in violation of MRPC 1.6(b); or that he engaged in conduct prejudicial to the administration of justice in violation of MRPC 8.4(c).

Two of the rules which the panel found were violated, MRPC 1.4(a) and 1.4(b), are explicitly based upon an attorney's duty to maintain reasonable communications with a client. In its discussion of the respondent's further violation of MRPC 1.1(c) [competent representation] and MRPC 8.4(a) [conduct which violates the rules of professional conduct], the panel made it abundantly clear that it was respondent's lack of communication with his client which was the gravamen of the offense. For example, in its discussion of respondent's violation of MRPC 1.1(c), the panel concluded that the respondent committed professional misconduct not by discontinuing his representation of Ms. Morson but by discontinuing the representation without advising his client's family of his unilateral decision to withdraw, without advising the circuit court of his non-appearance and without notification to the client.

There was more than adequate evidentiary support in the record for the panel's findings on the issue of respondent's lack of proper communication.

Ms. Morson's mother, Peggie Bell, testified that her only verbal contact with respondent was at her daughter's preliminary exam. After saying hello to him at the hearing, she next spoke with Mr. Karega at the conclusion of the preliminary examination.

> I talked to him, I was sitting in the car because that was the first time I had seen her in all these shackles and handcuffs, just tore me up. I was sitting in the car, he comes up to me, he says, well, I need to meet with you so we can find out who is going to be responsible for this bill. I looked at him, my husband said well, my wife ain't in no shape to talk to you now. So he said well, I need to talk to her, somebody needs to sign who is going to be responsible. So he said that we could meet, give me a couple of days, get myself back together, we would meet. We were suppose to meet at my mom's house. [T 79.]

Ms. Bell testified that although Mr. Karega was suppose to meet with her and her mother to discuss his further representation, there were no further communications with Mr. Karega. The family expected Mr. Karega to appear on Latasha's behalf in circuit court but he never showed up. At the arraignment in circuit court, Judge Barry Howard appointed counsel to represent the defendant.[1]

Under cross examination, Ms. Bell stated that she did not think that the $1,500 which was paid to Mr. Karega would be the total cost of the representation (T 83-84). In fact, she understood that further fees were to be paid and that two meetings were set up to discuss that very issue with Mr. Karega. However, she emphasized, those meetings did not take place because Mr. Karega did not show up. The next witness was Eric Bell, Latasha Morson's father. He testified that he personally paid Mr. Karega $500 which was part of the $1,500 payment which all parties acknowledge. There was apparently no conversation between Mr. Bell and Mr. Karega regarding any limitations on Mr. Karega's representation, the full amount of the fee which Mr. Karega intended to charge or any other matter of substance.

The Administrator's final witness was Mary Whitaker, Latasha Morson's grandmother. She is the one who went to Mr. Karega's home to pay the $1,000. She first met with Mr. Karega's assistant [now wife] and then Mr. Karega:

> I met with her first, his wife came down and she was talking to him, writing the receipt, etc., etc., he was upstairs talking from upstairs, but then he finally came down. And I told him we wanted to acquire him as lawyer for our granddaughter. We didn't have a lot of money, and that's why she took us to him because she said he was a good lawyer that would work with us. And he said he would, I said how much, he said well, don't worry about it, we'll work with you.

Q. Okay did he ever tell you a total fee that this was going to cost?

A. No he didn't.

Q. Did he ever tell you that this money that you paid on that day would only go so far, that he would only represent your granddaughter at the preliminary exam?

A. No. [T 96.]

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[1] The circuit court file (Exhibit 1) shows that Judge Howard entered an order at the July 21, 1999 hearing appointing Douglas Oliver to represent the defendant based upon her showing that she was without financial means to retain counsel. A week later, attorney William Cataldo was appointed, again based on financial need. Neither order mentions representation by Mr. Karega.

In short, all of the testimony presented by both parties, including respondent's own testimony, was consistent on the issue of the respondent's failure to communicate the nature of the services he was willing to provide and the fees he expected for those services. The respondent's wife/legal assistant was not called to testify as to her communications, if any, with the family on the issue of fees. Ms. Morson and her family were apparently under the impression that the respondent would continue his representation and they understood that additional fees were to be paid. For his part, the respondent revealed the extent of his commitment to his client in this statement to the panel:

> In retrospect, I should have sent certified letters, you know. My appearance was for preliminary only. It should be on paper if you don't pay me or if we don't come to an agreement, if you don't do, you know, what ever happens, it should have been in that letter. It shouldn't have been - - but this may, to the panel this may amount to misconduct. But I think misconduct is more an intent. I did not intend to harm my client. I didn't. All I wanted to do was to be in a situation that I was not locked in to a case that we weren't getting paid for. [T 137.]

We affirm the hearing panel's findings of misconduct based on respondent's lack of communication with his client and his client's family.

B. Respondent's Argument That He Was Deprived of a Fair Hearing

The respondent also argues that he was deprived of a fair hearing when the panel denied his request to adjourn the hearing on discipline. This argument is not supported by the record. While it is true that the respondent requested an adjournment of the proceeding in order to present witnesses who would testify as to mitigating or extenuating circumstances, it would not be accurate to say that the hearing panel denied that request. As noted in the transcript quotations above, the hearing panel specifically expressed its reluctance to foreclose the respondent from presenting evidence in mitigation. The panel directed that if the respondent wished a further hearing, he was to submit a brief explaining what he proposed to present. Respondent was directed to explain in his brief what evidence he intended to present and how he expected that it should effect the panel's decision on discipline. Respondent was to provide the names of his intended witnesses and the brief was to be in the panelists' hands by July 2, 2001.

The respondent did not meet the deadline set by the panel. He did submit a "Memorandum in Support of Extenuating and Mitigating Circumstances" on July 9, 2001. While that memorandum included certain documents as attachments, the untimely brief did not include the names of any

potential witnesses, the nature of their expected testimony or any statement remotely requesting a further hearing to present additional witnesses. In short, the respondent did not avail himself of the opportunity extended by the hearing panel to request a further hearing for the purpose of presenting mitigating evidence.

C. Level of Discipline

We next consider the Grievance Administrator's petition for review which is grounded on a claim that the hearing panel "erred and abused its discretion" in imposing a suspension of less than 180 days. The Grievance Administrator appropriately argues that the hearing panel was subject to the mandate from our Supreme Court in Grievance Administrator v Lopatin, 462 Mich 235; 612 NW2d 120 (2000) that hearing panels employ the American Bar Association's Standards for Imposing Lawyer Sanctions in determining the appropriate level of discipline once misconduct has been found. As the Grievance Administrator points out, if the panel did consider the ABA Standards, it did not articulate an analysis under those Standards in its report. It does not necessarily follow, however, that the panel's report on discipline is fatally flawed or that its decision to assess as suspension of 150 days was an abuse of discretion.

The Grievance Administrator argues that, upon proper application of the ABA Standards, the panel should have concluded that a suspension of the respondent's license is appropriate. We agree and, in fact, the panel did find that a suspension was appropriate.

We also agree with the Grievance Administrator's analysis under the ABA Standards that respondent's misconduct should be considered under ABA Standard 4.42 which states:

> 4.42 Suspension is generally appropriate when:
> (a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client, or
> (b) a lawyer engages in a pattern of neglect and causes injury or potential injury to a client.

As discussed above, the duty which was breached in this case was the duty to provide adequate information to the client to the extent reasonably necessary to allow the client to make informed decisions about the scope of respondent's representation and the fees to be paid for that representation. As noted in the commentary to ABA Standard 4.42, suspension may be appropriate in cases involving lawyers who do not communicate with their clients. The commentary includes a citation to an Illinois case where the lawyer's neglect of three matters included a case in which he

told the client that "he'd take care of everything," yet did not contact her or return her telephone calls. In Re Earl J. Taylor, 666 ILL. 2d 567, 363 NE2d 845 (1977).

The Administrator is correct in stating that the real question before the hearing panel was not whether a suspension should be imposed but what the length of that suspension should be. Under MCR 9.106(2), a hearing panel may impose a suspension of the license to practice law for "a specified term, not less than 30 days, with such additional conditions relevant to the established misconduct as a hearing panel . . . may impose, and, if the term exceeds 179 days, until the further order of a hearing panel, the board or the Supreme Court." We are aware of no formula in the ABA Standards or clear precedent in Michigan case law which would point so directly to the need for a 180 day suspension in this case that the panel's decision could be fairly characterized as an abuse of discretion. The Administrator acknowledges that the panel articulated the aggravating and mitigating factors which it considered. We are inclined to agree with the Grievance Administrator that the respondent's substantial experience in the practice of law [ABA Standard 9.22(i)] and the vulnerability of his client and her family [Standard 9.22(h)] could also have been taken into consideration. However, we are unable to adopt the Administrator's apparent underlying premise that any suspension less than 180 days is, perforce, an inadequate discipline or that the balancing of aggravating and mitigating factors is as simple as assigning a fixed mathematical value to each factor and then computing the pluses and minuses. No cases have been cited from Michigan or elsewhere in which an attorney's failure to adequately communicate with a single client resulted in a suspension requiring reinstatement proceedings.

This hearing panel appears to have given a good deal of consideration to its ultimate decision, including the aggravating effect of respondent's prior history of discipline for similar conduct involving lack of communication with clients. The panel further determined that the goals of the discipline process would be advanced by requiring that the respondent attend a seminar on the ethical aspects of law practice management to be presented by the Michigan Institute for Continuing Legal Education. The hearing panel imposed a level of discipline which is consistent with the ABA Standards and it will be affirmed.

C. The June 8, 2001 Affidavit of Judge Barry Howard

On page 2 of the reply to the respondent's brief in support of petition for review, the Administrator's counsel chastises the respondent's counsel for attempting to "testify" as to the practice in Michigan courts with regard to the need to file a new appearance as attorney of record when a felony case is bound over from district court to circuit court:

> If respondent's counsel has the intention of offering additional testimony which was not proffered at the hearing on this matter, it is necessary for him to file a motion for a new hearing. [Grievance Administrator's Brief in Response, 05/31/02, p 2.]

In the very next paragraph of the Administrator's reply brief, counsel argues against a position taken by the respondent by attaching an affidavit from the Honorable Barry Howard, former Chief Judge of the Oakland County Circuit Court. Judge Howard's affidavit is dated June 8, 2001, four days prior to the hearing before the panel on June 12, 2001. However, the affidavit was not referred to or offered into evidence at the hearing and appears to constitute an attempt to offer additional testimony which was not proffered at the hearing. The affidavit is not a part of the record which is properly before the Board on review and it is therefore stricken.

IV. Conclusion

The hearing panel's findings regarding the nature and extent of the respondent's non-communication with his client have evidentiary support in the record and are affirmed. The panel's conclusion that the nature of the respondent's misconduct, considered in light of the aggravating and mitigating circumstances warrants a suspension of 150 days with a condition requiring continuing legal education is consistent with the level of discipline resulting from application of the American Bar Association's Standards for Imposing Lawyer Sanctions. The record clearly reflects that the hearing panel did not arrive at is decision on the level of discipline until it had offered the respondent an opportunity to identify further witnesses to be called at a hearing on discipline. The respondent waived the opportunity to present such evidence. The hearing panel's decision is affirmed.

Board Members Wallace D. Riley, Theodore J. St. Antoine, Nancy A. Wonch, Ronald L. Steffens, Rev. Ira Combs, Jr., and George H. Lennon concur

Board Member Marie E. Martell concurs, in part, but would increase discipline to a suspension of 180 days.

Board Members William P. Hampton and Billy Ben Baumann, M.D. did not participate in this decision.