STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellee,

v

George T. Krupp, P-16269,

Respondent/Appellant,

Case No. 96-287-GA

Decided: April 4, 2002

BOARD OPINION

Appearances: Kenneth M. Mogill and F. Philip Colista for Respondent/Appellant George T. Krupp
Stephen P. Vella for Grievance Administrator/Appellee

I. Introduction

Respondent's license to practice law was suspended for a period of 90 days. The hearing panel found respondent committed misconduct, specifically, that respondent, George Krupp, made a knowing misrepresentation to a court and to opposing counsel. The panel also found that Mr. Krupp obstructed opposing counsel's access to a document. Respondent timely filed a petition for review. Imposition of discipline was stayed pending review by the Board.

The Attorney Discipline Board has conducted review proceedings, including review of the record and due consideration of the briefs and arguments presented by the parties. For the reasons discussed more fully below, and in accordance with MCR 9.118(D), we affirm the decision of the hearing panel with respect to the finding that Mr. Krupp's conduct, in representing that a letter presented to the court and to opposing counsel was written by his client's psychiatrist, constituted a violation of Mr. Krupp's obligation to be truthful to the tribunal and to opposing counsel. However, the Board has determined that the record does not provide sufficient evidence to support a finding that the respondent's conduct was "unlawful." Thus, the Board will vacate the hearing panel's determination that Mr. Krupp violated MRPC 3.4(a).

The imposition of a 90-day suspension in this case is supported by prior case law and comports with the ABA Standards for Imposing Lawyer Sanctions. The hearing panel's order imposing a 90-day suspension will be affirmed.

II. Procedural History

A formal complaint against Mr. Krupp was filed with the Attorney Discipline Board on December 19, 1996. The complaint was based upon requests for investigation filed by Mr. Krupp's former client, [Complainant], and opposing counsel, Peter Bosch.

The complaint alleged that [Complainant] retained Mr. Krupp on March 28, 1995 to represent her in a post-judgment divorce motion filed by her ex-husband, John Linsley. Mr. Linsley moved for a change in custody following [Complainant]'s medication overdose / alleged suicide attempt. The motion was to be heard on March 31, 1995, three days following the engagement, in Kent County Circuit Court.

Mr. Krupp advised [Complainant] to obtain a detailed letter from her treating psychiatrist, J.F. Girard Rooks, M.D., to support [Complainant]'s defense to the motion. On March 30, 1995, [Complainant] drafted a letter for Dr. Rooks' signature. However, because [Complainant] did not have an appointment and because her file was not at that particular office location, Dr. Rooks was unable to review or approve the proposed letter. Instead, Dr. Rooks sent [Complainant] to meet with Marlice Van Zytveld, a therapist in the Hudsonville office. Ms. Van Zytveld helped [Complainant] revise the contents of the letter. Therapist Van Zytveld refused to sign the letter because she disagreed with an implication in the letter (that a change in [Complainant]'s medication regimen had caused the suicide attempt). The edited draft of the letter was not signed by either Dr. Rooks or Ms. Van Zytveld. Dr. Rooks testified that his practice is to write his own letters, when such are requested, and that he would not ordinarily have signed such a letter prepared by a patient.

On the morning of March 31, 1995, immediately prior to the hearing, [Complainant] provided Mr. Krupp with copies of the edited and unedited proposed letters. [Complainant] testified that she informed Mr. Krupp that she had prepared the letter and that Dr. Rooks had not reviewed, approved, or signed the letter. However, while addressing the court and opposing counsel, Mr. Krupp offered a copy of the letter in support of his defense to the motion for change of custody. Mr. Krupp claims that, at the time of the hearing, he was not aware that the letter had not been approved or signed by Dr. Rooks. The respondent asserts that [Complainant] did not inform him that the letter was not authored by Dr. Rooks. In the alternative, Mr. Krupp claims that in the frenzied moments prior to the hearing, on a busy motion day, he did not hear [Complainant] say that she had written the letter, or that Dr. Rooks had not approved the letter.

Mr. Krupp showed a copy of the letter to opposing counsel, Peter Bosch. The respondent then offered the letter to Judge Soet in support of the argument that [Complainant] should retain custody of the Linsley children. Judge Soet relied, at least in part, on the letter in his decision to deny Mr. Linsley's motion for change of custody. Following the hearing, Mr. Krupp refused to produce a copy of the letter for opposing counsel, Mr. Bosch. Mr. Krupp claimed that the letter was protected by patient-physician privilege.

The complaint filed by the Grievance Administrator charged the respondent with making a misrepresentation to the court and to opposing counsel, and obstructing opposing counsel's access to a document. Respondent filed an answer to the complaint, denying the allegations of misconduct.

The first hearing was held on June 2, 1997. The next three hearing dates (August 18, 1997, September 24, 1997, and November 6, 1997) were adjourned at the request of the Grievance Administrator. ([Complainant] was injured in an automobile accident and was not available to testify on those dates.) The Grievance Administrator rested his case at the conclusion of the hearing on November 11, 1997.

On February 2, 1998, Mr. Krupp filed motions for a directed verdict and for dismissal. The motions were briefed by both parties, and oral argument was heard. The panel denied both motions. The hearing resumed, and was concluded on February 23, 1998.

On June 15, 1999, the panel filed an 87-page "Report on Misconduct," authored by the panel chair. The other two panel members offered separate but concurring opinions. The aggravation/mitigation hearing was scheduled for September 23, 1999.

The respondent obtained new counsel at this stage of the proceedings. (Prior to this time, he had been proceeding partially *in pro per*, assisted at times by his attorney son.) Mr. Krupp's new counsel filed a motion for rehearing based, in part, on the results of a private polygraph examination of Mr. Krupp, conducted on July 5, 1999.

On August 25, 2000, the hearing panel issued an order denying Mr. Krupp's motion for rehearing. The panel also issued an order adopting amendments to the panel's original report on misconduct and the concurring opinion of Panelist Brasic. The panel found that Mr. Krupp had violated: MCR 9.104(1)-(4)[1]; MRPC 3.3(a)(1)[2]; MRPC 3.3(a)(4)[3];

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1 MCR 9.104(1)-(4) states:
The following acts or omissions by an attorney, individually or in concert with another person, are misconduct and grounds for discipline, whether or not occurring in the course of an attorney-client relationship:

(1) conduct prejudicial to the proper administration of justice;
(2) conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach;
(3) conduct that is contrary to justice, ethics, honesty, or good morals; [and]
(4) conduct that violates the standards or rules of professional responsibility adopted by the Supreme Court...

2 MRPC 3.3(a)(1) states, "A lawyer shall not knowingly...make a false statement of material fact or law to a tribunal..."

3 MRPC 3.3(a)(4) states, "A lawyer shall not knowingly...offer evidence that the lawyer knows to be false..."

MRPC 3.4(a)[4];MRPC 3.4(b)[5]; MRPC 4.1[6]; and MRPC 8.4(a)-(c)[7].

The aggravation/mitigation phase of the discipline hearing took place on December 20, 2000. The hearing panel issued its unanimous "Report on Discipline" on July 17, 2001. The panel ordered that Mr. Krupp's license to practice law in Michigan be suspended for a period of 90 days, effective August 8, 2001. Mr. Krupp timely petitioned for review of the panel's decision. The imposition of discipline was stayed pending review by the Attorney Discipline Board.

III. Standard of Review

The standard of review in attorney discipline proceedings in Michigan is well established, as stated in Grievance Administrator v Edgar J. Dietrich, 99-145-GA (ADB 2001), p 2:

> 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).
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> 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).

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4 MRPC 3.4(a) states:

> A lawyer shall not...unlawfully obstruct another party's access to evidence; unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value; or counsel or assist another person to do any such act...

5 MRPC 3.4(b) states:

> A lawyer shall not...falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law...

6 MRPC 4.1 states:

> In the course of representing a client, a lawyer shall not knowingly make a false statement of material fact or law to a third person.

7 MRPC 8.4(a)-(c) states:

> It is professional misconduct for a lawyer to:
> (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
> (b) engage in conduct involving dishonesty, fraud, deceit, misrepresentation or in violation of the criminal law, where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer; [or]
> (c) engage in conduct that is prejudicial to the administration of justice...

While at first blush the voluminous materials in this case appear to require a complex analysis, the review actually presents relatively straightforward issues. The Board must determine whether the record in this case provides proper evidentiary support for the findings of the hearing panel. The Board does not conduct a *de novo* review of the factual findings; nor does the Board substitute its own judgment for the judgment and credibility determinations of the panel. Id. Thus, the issue is not whether the Board tends to believe the testimony of one witness over another. Because there is proper evidence in the record to support the panel's determination, we will affirm the panel's finding of misconduct.

IV. Discussion

A. Knowing Misrepresentation

i. Testimony of Judge H. David Soet

Judge H. David Soet testified during the panel hearing that he recalled:

> that Mr. Krupp presented a letter from [Complainant]'s doctor, and the letter essentially said that she had had a problem with her medications...[t]he allegation being made was that she was suicidal and that, therefore, she should not be around the children. And Mr. Krupp presented this letter from a physician, and I read it. The letter said that she had been on some kind of medications, and the medications had become imbalanced or unbalanced causing her to become depressed and suicidal. That's my recollection. [06/02/97 Panel Hearing Transcript, p 29.]

The testimony of Judge Soet, on direct examination by counsel for the Grievance Administrator, continued:

> [Counsel]: It's your understanding that based on what Mr. Krupp was saying, that this was a letter by the doctor?
> [Judge Soet]: Based on what Mr. Krupp was saying, he was presenting me with a letter from his client's physician.
> [06/02/97 Tr, p 30.]

The transcript of the custody motion hearing supports Judge Soet's recollection. At the hearing, Mr. Bosch detailed the reasons his client, Mr. Linsley, was moving for a change of custody. Mr. Bosch described the fact that [Complainant] had overdosed on medication. A neighbor called the police and [Complainant] was taken to the emergency department. Mr. Bosch informed the court that the neighbor was present in court during the hearing and was available to testify to his observations regarding [Complainant]'s suicide attempt.

The motion hearing transcript includes Mr. Krupp's statements to the court as he presented "the letter":

> If the Court please, the letter I submitted to the Court from Dr. Roofs (phonetic) I had shown to Mr. Bosch. This situation was chemical imbalance when the doctor changed her prescriptions because of her thyroid condition. It was immediately alleviated when the doctor changed the medication.
>
> She had a complete set of blood tests, and as the letter indicates, she is going to go for a physical. There is no immediate harm to the children. She did admit she had got depressed because of the medication changed. And the doctor clearly states that in his letter. [Motion Hearing Transcript, pp 6-7.]

Mr. Krupp unambiguously represented to the court that the letter he presented during the hearing was "from" Dr. Rooks, [Complainant]'s psychiatrist. The issue before the panel became whether Mr. Krupp was aware that the letter was not, in fact, a letter from Dr. Rooks when he presented it to Mr. Bosch and Judge Soet.

ii. Respondent George Krupp

The respondent claimed that he first learned on December 15, 1995 that the letter had not been written by Dr. Rooks. He asserted that he was "surprised," after seeing Mr. Bosch at the a December 15th motion hearing, when Mr. Bosch stated that the letter submitted in March was a forgery and that it had not come from Dr. Rooks. Mr. Krupp further claimed that, on December 15th, he confronted [Complainant] about the authenticity of the letter. [Complainant] admitted to him that she had authored the letter. (However, [Complainant] claims she had already informed Mr. Krupp, just prior to the start of the March 31st custody hearing, that she, not Dr. Rooks, had written the letter.)

The question before the panel was one of credibility: who was telling the truth about whether or not Mr. Krupp knew, at the time he presented the letter to the court, that the letter was not written by Dr. Rooks? The hearing panel found [Complainant]'s testimony to be more credible than Mr. Krupp's testimony. The panel found that Mr. Krupp did know that the letter was not from Dr. Rooks at the time he presented it to the court. Mr. Bosch prepared an "Order Denying Defendant's Request for Temporary Custody and Referring Case to the Friend of the Court for Custody Evaluation." Mr. Krupp rejected Mr. Bosch's proposed order, and drafted a proposed order which omitted any reference to the letter. The proposed orders regarding Judge Soet's March 31, 1995 ruling support the panel's findings.

iii. Testimony of Complainant [Complainant]

[Complainant] testified that she informed Mr. Krupp, prior to the start of the motion hearing, that she, not Dr. Rooks, had written the letter. It is clear from the exhibits that the therapist, Ms. Van Zytveld, altered the text of the letter presented to her, in order to clarify that the content was written about [Complainant], **by** [Complainant]. [Complainant] claims that she presented the Mr. Krupp with a copy of the edited version but Mr. Krupp informed her he would not use it, as it was "not professional looking." 11/11/97 Hearing Tr, p 10. Instead, Mr. Krupp offered to the court the unedited letter, referring to it as a letter "from" Dr. Rooks.

[Complainant]'s testimony during the hearing supports the panel's findings of fact. On direct examination by Mr. Vella, she testified that she had informed Mr. Krupp that Dr. Rooks had not signed the letter.

The extensive record in this case reveals that there was adequate evidence presented to support the hearing panel's finding that Mr. Krupp made a knowing misrepresentation to the court and to opposing counsel. As to the misrepresentation charge, the Board will affirm the panel's finding that Mr. Krupp committed misconduct.

B. Unlawful Obstruction

The hearing panel also determined Mr. Krupp committed misconduct by obstructing opposing counsel's access to a document. Opposing counsel, Peter Bosch, testified that he repeatedly asked Mr. Krupp for a copy of the letter presented to the court at the custody motion hearing. He called Mr. Krupp's office to ask for a copy of the letter, without success. Mr. Bosch finally resorted to filing a discovery motion for production of documents, including the "Dr. Rooks letter."

In December 1995, Mr. Krupp filed a motion to withdraw as counsel for [Complainant]. In early 1996, Mr. Bosch finally obtained a copy of the "Rooks letter" from [Complainant]'s successor counsel. Mr. Bosch sent a copy of the letter to Dr. Rooks. Dr. Rooks' written response, in February 1996, indicated that he had neither written nor approved the letter presented to the court by Mr. Krupp. The record provides ample evidentiary support for the hearing panel's findings that Mr. Krupp obstructed opposing counsel's access to a relevant and important document.

Respondent asserts, however, that because the formal complaint did not charge him with "unlawful" conduct, the panel cannot find then find that his conduct was unlawful.[8] Michigan Rule of Professional Conduct 3.4(a) (*emphasis added*) states that:

> A lawyer shall not...**unlawfully** obstruct another party's access to evidence; **unlawfully** alter, destroy, or conceal a document or other material having potential evidentiary value; or counsel or assist another person to do any such act...

Mr. Krupp argued that because Judge Soet never issued an order mandating the release of the letter, he was under no obligation to do so. Thus, he claims, his failure to provide Mr. Bosch with a copy of the letter could not have been "unlawful" conduct. We agree.

Black's Law Dictionary 1377 (5th ed, 1979) defines "unlawful" as:

> [t]hat which is contrary to, prohibited, or unauthorized by law. That which is not lawful. The acting contrary to, or in defiance of the law; disobeying or disregarding the law. While necessarily not implying the element of criminality, it is broad enough to include it.

The Grievance Administrator did not offer any evidence to establish that Mr. Krupp's actions in withholding the letter from Mr. Bosch were contrary to or prohibited by law, nor did the panel address the "unlawful" element of MRPC 3.4(a).

While the record presents sufficient evidence to support the panel's finding that Mr. Krupp obstructed Mr. Bosch's access to the Rooks letter, it does not sustain a finding that Mr. Krupp's actions were "unlawful." Accordingly, we vacate the finding that Mr. Krupp violated MRPC 3.4(a).[9]

C. Polygraph

Mr. Krupp argues that the hearing panel's refusal to receive the results of his polygraph examination requires the board to amend the level of discipline imposed in this case. However, with respect to the admissibility of polygraph examination results, the Michigan Supreme Court has stated:

> In People v. Barbara, 400 Mich 352, 364; 255 NW2d 171, [175] (1977), [the Michigan Supreme] Court held that the results of a polygraph examination are not admissible at trial. The basic rationale for the Barbara Court's conclusion was that the polygraph technique had not received the degree of acceptance or standardization

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8 Respondent's brief on appeal notes that the failure of the Grievance Administrator to include an allegation that Mr. Krupp "unlawfully" obstructed access to the letter would have provided grounds for a motion to dismiss this charge of violation of MRPC 3.4(a). However, a motion to dismiss was not filed, and the argument was not raised before the hearing panel.

9 The Board notes, however, that the finding of misconduct in the form of misrepresentation to the court and to opposing counsel is, in itself, sufficient to support the imposition of a 90-day suspension in this case.

> among scientists which would allow admissibility. Id. See also People v Davis, 343 Mich 348, 370; 72 NW2d 269, [281] (1955), quoting People v Becker, 300 Mich 562, 566; 2 NW2d 503, [505] (1942).
>
> The judicial concern with scientific consensus regarding the procedure is because "'the quantity [the polygraph] attempts to measure -- the truthfulness of a witness -- is . . . directly related to the essence of the trial process.'" People v Barbara, supra, p 404, quoting note, The emergence of the polygraph at trial, 73 Colum L R 1120, 1141 (1973). Thus, exclusion at trial of polygraph results rests upon the judicial estimate that the trier of fact will give disproportionate weight to the results and consider the evidence as conclusive proof of guilt or innocence. See also McCormick, Evidence (2d ed), §§ 207, p 507. [People v. Ray, 431 Mich 260, 265; 430 NW2d 626, 628 (1988).]

Similarly, the Sixth Circuit has held that:

> [A]...trial court's refusal to allow [a witness'] polygraph results to usurp the role of the jury in assessing [the witness'] credibility was, and still is, entirely consistent with clearly established Supreme Court precedent. The Supreme Court recently reaffirmed that "there is simply no consensus that polygraph evidence is reliable. To this day, the scientific community remains extremely polarized about the reliability of polygraph techniques." United States v. Scheffer, 523 US 303, [309] 118 S Ct 1261, 1265; 140 L Ed 2d 413, [419] (1998) (*per se* rule against admission of polygraph evidence in court martial proceedings did not violate the accused's Fifth or Sixth Amendment rights to present a defense). [King v Trippett, 192 F3d 517, 522 (CA 6 (Mich), 1999).]

The respondent asserted, however, that even if the panel did not admit it as evidence, the panel should have considered the polygraph results as support for the respondent's motion to vacate the findings or at the sanction phase of the proceedings. He argued that because he was not induced or coerced into taking the polygraph exam, the results should be treated as highly credible.

The Grievance Administrator's argument on this point is persuasive. The Grievance Administrator claims that admission of the polygraph results solely for the purpose of bolstering Mr. Krupp's testimony would be highly prejudicial. This is especially true at the mitigation/aggravation phase of the hearing, where credibility of the respondent may be central to the hearing panel's determination of appropriate discipline. "Generally, the use of polygraph results to prove a party's innocence is prohibited." Barnier v Szentmiklosi, 810 F2d 594, 596 (CA6 (Mich) 1987). Under some limited circumstances, the fact that a polygraph was administered may be relevant, however, it is not admissible to establish the truth or falsity of a fact that is in dispute. Id. If evidence of a polygraph examination allows or encourages the trier of fact to draw improper inferences, the evidence is prejudicial and should not be allowed. Id., p 597. Consideration of the results of Mr.

Krupp's polygraph examination, even for purposes of mitigation, would be prejudicial to the hearing panel's determination of the appropriate sanction.

Similarly, the trial panel did not err in refusing to admit the results of Mr. Krupp's polygraph examination relative to the respondent's motion to vacate the panel's findings. In Barbara, supra, pp 412-13, the Michigan Supreme Court held that polygraph examination results could be considered when deciding motions for new trial made on the basis of newly discovered evidence. However:

> [a]s a new trial may be awarded only upon presentation of genuinely new evidence meeting certain strict standards...the polygraph results must be used to support the credibility of new witnesses or to otherwise support new evidence which the finder of fact in the previous trial has not already reviewed. Thus, a polygraph test purporting to demonstrate that the defendant whose story the finder of fact has already rejected is actually telling the truth would not satisfy the conditions. [Barbara, supra, pp 415-16.]

In this case, Mr. Krupp has not argued that he has any new witnesses or new evidence to support his claim. Instead, Mr. Krupp seeks to have his polygraph examination results utilized for the purpose of supporting the veracity of his version of events - a version which the hearing panel rejected. Even with respect to a motion for a new trial, this use of polygraph results is improper under Barbara. "If the only new evidence is the polygraph examination, this of course would be inadmissible at trial and would not be a sufficient basis for granting a new trial." Barbara, supra, p 413, n 45. We conclude that the hearing panel did not err in refusing to consider the polygraph examination results for purposes of mitigation or with respect to the respondent's motion to vacate the panel's findings.

V. Level of Discipline

A. Application of the ABA Standards

The hearing panel recognized its obligation to utilize the ABA Standards for Imposing Lawyer Sanctions. (HP Report on Discipline at 12.) The panel considered the factors enunciated in ABA Standards 6.11, 6.12 and 9.0 in reaching its ultimate conclusion that a suspension of 90 days was appropriate under all of the circumstances. The respondent seeks the Board's review of the level of discipline on the grounds that while the hearing panel properly looked to Section 6.12 of the ABA Standards, its consideration of aggravating and mitigating factors was flawed. In reply, the Grievance Administrator argues that the 90-day suspension ordered by the hearing panel is justified upon consideration of the ABA Standards and similar cases in Michigan.

i. ABA Standard 3.0

Under ABA Standard 3.0, the hearing panel was directed to consider the following factors:

a. the duty violated;
b. the lawyer's mental state;
c. the potential or actual injury caused by the lawyer's misconduct; and
d. the existence of aggravating factors or mitigating factors.

In this case, respondent's misrepresentation regarding the authenticity of the "Rooks letter" violated a duty to the public, the legal system, and to the profession. Mr. Krupp's failure to provide Mr. Bosch with a copy of the letter, while not "unlawful," violated a duty to the legal system and to the legal profession. There is sufficient evidence in the record to support the hearing panel's finding that Mr. Krupp's misrepresentation was knowing, rather than negligent.

By misrepresenting the authenticity of the letter which he brandished in open court, respondent's conduct resulted in, at the very least, potential injury to the opposing party, Mr. Linsley. Of equal importance is the actual and potential injury to both the legal profession and the legal system when a lawyer is found to have misrepresented a document. As the Board stated in Grievance Administrator v Mary E. Gerisch, ADB 171-87; 197-87 (ADB 1988):

> Our legal system depends, in large part upon the assumption that lawyers, as officers of the court, are telling the truth when they make statement about the cases they are handling. An attorney who creates 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 . . . [Grievance Administrator v Mary E. Gerisch, supra at p 3.]

Under the model suggested by the ABA Standards, the tribunal must make an initial determination as to appropriate sanction after answering the first three questions above. The tribunal must then consider any relevant aggravating or mitigating factors to determine whether a greater or lesser sanction would be appropriate.

ii. ABA Standard 6.1

Under the ABA Standards, discipline for false statements, fraud, or misrepresentation is to be determined under Standard 6.1, which provides:

> Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving conduct that is prejudicial to the administration of justice or that involves dishonesty, fraud, deceit, or misrepresentation to a court:
>
> 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.
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> 6.12 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.
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> 6.13 Reprimand is generally appropriate when a lawyer is negligent either in determining whether statements or documents are false or in taking remedial action when material information is being withheld, 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.

In these review proceedings, neither the respondent nor the Grievance Administrator challenges the applicability of Standard 6.12. We agree that suspension, rather than disbarment or reprimand, is the presumptive level of discipline under the facts of this case. We therefore turn to the respondent's argument that the panel's consideration of aggravating and mitigating factors was flawed.

iii. Aggravating / Mitigating Factors under ABA Standards 9.22 and 9.32

The panel's report stated that "the proofs meet both 6.12 [suspension] and 6.11 [disbarment]; however, considering the mitigating factors, [the hearing panel chair] will abandon 6.11 and vote to assess Discipline only under 6:12..." HP Report 7/17/01, p 25. The July 17, 2001 "Report on Discipline" was authored by the panel chair, Kenneth Walz. Panelists Kent Mudie and Jon Brasic authored separate concurrences.

It is important to note that the panel did not apply the aggravating factors to increase the level of discipline. Rather, the panel focused on the mitigating factors to justify a reduction in the presumptive level of discipline from possible disbarment to suspension.

a. Aggravating Factors

Respondent argues that the hearing panel:

> improperly determined that Mr. Krupp had a selfish motive, that the case involved a pattern of misconduct and multiple offenses and that the case involved vulnerable victims, Mr. and [Complainant]. [Respondent's brief on appeal, pp 37-38.]

With respect to the "dishonest or selfish motive," we find evidentiary support for the hearing panel's conclusion that Mr. Krupp misrepresented that the letter was written by Dr. Rooks to "win" the custody motion at any cost. Similarly, there is support for the panel's finding that Mr. Krupp avoided providing Mr. Bosch with a copy of the letter for the apparent purpose of delaying or preventing opposing counsel's discovery that the letter was not what it had been purported to be in open court.

The hearing panel afforded some weight to its finding that respondent committed multiple offenses and engaged in a pattern of misconduct. There is no evidence to establish that the respondent had made misrepresentations in a series of cases or to more than one court. Instead, the panel found that Mr. Krupp's ongoing behavior in refusing to turn over the letter to Mr. Bosch constituted repeated attempts to camouflage his dishonesty. This, the panel concluded, amounted to multiple offenses of wrongdoing and a pattern of misconduct.

Finally, in the context of the emotionally charged custody proceedings in which respondent's conduct occurred, we agree to some extent with the hearing panel's characterization of both respondent's client and Mr. Linsley as "vulnerable."

Upon review of the record, we conclude that there is sufficient evidence in that record to support the panel's findings that respondent's conduct was aggravated by selfish motive, a pattern of misconduct, and the vulnerability of the victim of that misconduct.

b. Mitigating Factors

In addition to his argument that the hearing panel gave too much weight to the aggravating factors in this case, the respondent argues that the panel gave too little weight to the mitigating factors which appear in the record. With regard to both aggravating and mitigating factors, the Board notes that the ABA Standards themselves provide no guidance with regard to the relative weight to be given to a particular factor nor do the Standards suggest how aggravating and mitigating factors are to be balanced against each other. Instead, the ABA Standards presume that the tribunal has discretion in balancing aggravating and mitigating factors in light of the seriousness of the offense.

Reviewing the panel's report, the panel appears to have given "partial positive weight" to respondent's cooperative attitude toward the discipline process (HP Report 7/17/01, p 22) and "substantial weight" to respondent's character and reputation in the legal community (HP Report 7/17/01, p 22). We acknowledge, as did the panel, that the significant delay in the adjudication of this matter between the filing of the formal complaint in December 1996 and the issuance of the final panel report in July 2001 warrants consideration as a mitigating factor. It is not necessary to recount the reasons for that delay here other than to note that they included the unavailability of the complainant following an automobile accident, the health of the panel chairperson and the considerable time expended by the panel in preparing its lengthy reports. The fact remains that the hearing panel did consider the mitigating effect of that delay in rendering its decision. (HP Report 7/17/01).

B. Sanctions for Misrepresentation in Michigan

As noted above, there is no dispute between the parties that the hearing panel acted appropriately in first determining that respondent's conduct was the type of misconduct described in ABA Standard 6.12 and that, absent aggravating or mitigating factors, a suspension would be the presumptive level of discipline. We affirm the hearing panel's conclusion that the aggravating factors in this case are not sufficient to warrant an upward adjustment to disbarment. Nor are the mitigating factors sufficiently compelling to justify a downward adjustment to a reprimand. The Grievance Administrator has not petitioned for review of the sanction imposed. The remaining question before the Board, therefore, is whether the hearing panel erred in its decision to impose a suspension of 90 days as opposed to a shorter suspension.

In considering this question, the ABA Standards provide no further guidance. While ABA Standard 2.3 suggests that suspensions should "generally" be for a period equal to or greater than six months but should, in no event, be longer than three years, the Board has previously noted that the Michigan Court Rules expressly provide for suspensions of less than six months. Grievance Administrator v Robert H. Golden, 96-269-GA (ADB 2001) lv den ___ Mich ___ (2002). At the other end of the spectrum, panels and the Board in Michigan may impose suspensions greater than three years for the express purpose of triggering the recertification requirement in MCR 9.123(C). See Grievance Administrator v Michael J. Kavanaugh, 66-88; 91-88; 108-88 (ADB 1989). A suspension of an attorney's license to practice law in Michigan must be for a specified term not less than 30 days. MCR 9.106(2). An important distinction between types of suspension is drawn in

MCR 9.123, which allows an attorney suspended for 179 days or less to be reinstated automatically with the filing of an affidavit, while attorneys suspended for 180 days or more must undergo the more rigorous and time consuming reinstatement process outlined in MCR 9.124.

In short, the Michigan Court Rules describe significant differences in the reinstatement requirements following an order of discipline, depending on the period of suspension. Since its creation in 1978, the Attorney Discipline Board, through its written opinions, has attempted to achieve consistency in the discipline imposed for similar acts of misconduct. Indeed, our Court's interim adoption of the ABA Standards has not changed that role. As the Court explained in directing the Board to follow the Standards:

> We caution the ADB and hearing panels that our directive to follow the ABA Standards is not an instruction to abdicate their responsibility to exercise independent judgment. Where, for articulated reasons, the ADB or a hearing panel determines that the ABA Standards do not adequately consider the effects of certain misconduct, do not accurately address the aggravating or mitigating circumstances of a particular case, or do not comport with the precedent of this Court or the ADB, it is incumbent on the ADB or the hearing panel to arrive at, and explain the basis for, a sanction or result that reflects this conclusion. Grievance Administrator v Albert Lopatin, 462 Mich at 248 n 13 (2000).

In this case, the hearing panel has analyzed respondent's misconduct under the ABA Standards and it has considered and discussed the applicable aggravating and mitigating factors. At the conclusion of this process, the hearing panel, consisting of three attorneys appointed by the Board, reached a unanimous conclusion that a suspension of 90 days was appropriate under the circumstances. Under the applicable court rules, the respondent will be required to refrain from the practice of law for 90 days and he will be required to provide written notice of his suspension to his clients and tribunals, but he will not be required to re-establish his fitness to practice law in reinstatement proceedings before another panel.

As the parties in this case have ably pointed out, discipline for cases involving misrepresentation has historically resulted in discipline ranging from reprimand to revocation. The factual scenarios in those cases range from an attorney's misrepresentation to a client regarding the status of a probate matter made without intent to conceal negligent conduct [Grievance Administrator v Jonathan P. Miller, DP 237/82 (ADB 1984) affirming hearing panel order of reprimand]; to outright fabrication and forgery of a purported settlement agreement, [Grievance Administrator v Mary E. Gerisch, supra, increasing three year suspension to revocation]. In the cases cited by both parties, the differences among levels of discipline imposed are related to the differences in the nature of the misrepresentations. None of the cases cited by the parties are precisely on point in terms of the facts presented here, that is, misrepresentation to a tribunal by creating a false impression as to the nature of a document but without the apparent participation of the attorney in the procurement or preparation of the document.

VI. Conclusion

There is evidentiary support in the whole record for the hearing panel's conclusion that respondent committed professional misconduct by misrepresenting, to opposing counsel and to a tribunal, the authenticity and authorship of a letter provided to him by his client. However, we vacate the hearing panel's finding that respondent *unlawfully* obstructed another party's access to evidence in violation of MRPC 3.4(a).

Absent the presence of significantly mitigating factors, respondent's misconduct may well have resulted in a suspension of 180 days or more. Nevertheless, the hearing panel's decision to impose a suspension of 90 days was not clearly erroneous nor does it fail to comport with established precedent of the Attorney Discipline Board or the Supreme Court. The suspension of respondent's license for 90 days is therefore affirmed.

Board Members Wallace D. Riley, Theodore J. St. Antoine, Nancy A. Wonch, William P. Hampton, and Rev. Ira Combs, Jr. concurred in this decision.

Board Members Ronald Steffens, Marsha M. Madigan, M.D., and Marie E. Martell did not participate.

Board Member Grant Gruel was recused and did not participate in the hearing or decision.