STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellant,

v

Albert Lopatin, P-16794,

Respondent/Appellee,

Case No. 92-224-GA

Decided: AUG 15 2001

BOARD OPINION

The Grievance Administrator filed a five count formal complaint in September 1992, alleging, among other things, that respondent gave things of value to former Court of Appeals Judge Richard M. Maher contrary to DR-7-110(A)[1] and engaged in an ex parte communication with former Court of Appeals Judge S. Jerome Bronson in violation of DR 7-110(B).[2] In this Board's February 1996 opinion, we affirmed the panel's finding that Judge Maher's use of respondent's firm's Florida condominium from time to time constituted a gift because Maher reimbursed respondent's firm at the government rate as opposed to at what the panel determined to be market value. The Board also affirmed the panel's findings and conclusions regarding a memorandum respondent gave to Judge Bronson. The memo was prepared by an associate at respondent's direction following oral argument before a panel of the Court of Appeals presided over by Judge Bronson in 1986. The memo was addressed to respondent and contained the associate's reflections on the two issues argued to the

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[1] This Disciplinary Rule was part of the Michigan Code of Professional Responsibility in effect prior to adoption of the Michigan Rules of Professional Conduct in October 1988. DR 7-110(A) provided: "A lawyer shall not give or lend anything of value to a judge, official, or employee of a tribunal."

[2] DR 7-110(B) read:

> In an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending, except:
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> (1) In the course of official proceedings in the cause.
> (2) In writing if he promptly delivers a copy of the writing to opposing counsel or to the adverse party if he is not represented by a lawyer.
> (3) Orally upon adequate notice to opposing counsel or to the adverse party if he is not represented by a lawyer.
> (4) As otherwise authorized by law.

DR 7-110(B)'s counterpart in the Model and Michigan Rules of Professional Conduct is MRPC 3.5(b) which provides that a lawyer shall not "communicate ex parte with [a judge, juror, prospective juror, or other official] concerning a pending matter, except as permitted by law."

Court. Evidence established that passages from the memo were used by Judge Bronson in a handwritten memo to his law clerk. The clerk then incorporated the language into the Court's opinion.[3] The memo from the judge to his clerk was two and one-half pages in length (the handwriting was large) and cited two cases released after the parties had briefed the case.[4]

This Board's February 1996 opinion affirmed the imposition of a reprimand for these two acts of misconduct. The Grievance Administrator sought leave to appeal to the Court seeking increased discipline for the ex parte contact. In lieu of granting leave, the Court remanded the matter to the panel for additional findings and to consider whether any new or changed findings should affect the level of discipline. The panel addressed various items raised by the Court's remand order and made additional findings in a 33-page supplemental report. The panel also increased discipline to a suspension of 45 days. After further proceedings before the Court, this Board, on remand, reinstated the reprimand. Upon application by the Administrator, the Court granted leave to appeal. In a comprehensive opinion laying out the procedural history of the case and adopting the American Bar Association's Standards for Imposing Lawyer Sanctions (ABA Standards), the Court again remanded this matter to us for reconsideration of the level of discipline in light of the Standards. Grievance Administrator v Lopatin, 462 Mich 235; 612 NW2d 120 (2000).

In remanding the matter to this Board, the Court said:

> The Grievance Administrator urges us to increase the level of discipline imposed by the ADB for respondent's misconduct. We invoke our authority under MCR 9.122(E) to change a disciplinary order only if the sanction imposed by the ADB is inappropriate. Rostash, 457 Mich. at 297. In this case, however, the ADB erroneously concluded that our prior order limited the disciplinary options. Further, the ADB did not have the benefit of our guidance regarding use of the ABA standards. We therefore remand this case to the ADB for reconsideration of its decision regarding the appropriate level of discipline in light of the ABA standards. On remand, the ADB may consider all sanction options, including disbarment. [Lopatin, 462 Mich at 263.]

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[3] There was no evidence that the associate knew the memo had been given to the judge or that the law clerk knew the source of the language.

[4] Testimony at the hearing never explained why respondent simply did not file and serve a supplemental brief in the ordinary course if he wanted to highlight the recent authorities he argued orally. The associate's memo which was given to Judge Bronson appears to cover points already presented to the Court, either through briefing or oral argument. For example, the associate wrote: "I think the issue will be resolved rather simply by the panel based on the Supreme Court's opinion in Moody v Pulte Homes, Inc., 423 Mich 150 (1985), which was, of course, released after our briefs were submitted." Thereafter, three sentences of analysis followed. The memo seems to suggest either that the points were made at oral argument or were too obvious to be missed by the Court in writing its opinion. Also, the associate wrote, as to another issue. "It seems to me that Johnson v. Corbet, 423 Mich 304 (1985) controls. I am glad that you brought this out before the panel since it was released after my brief was filed."

Under Lopatin, and this Board's opinion in Grievance Administrator v Musilli, 98-216-GA (ADB 2000), the decisional process for imposing discipline begins with three questions:

> (1) What ethical duty did the lawyer violate? (A duty to a client, the public, the legal system or the profession?)
>
> (2) What was the lawyer's mental state? (Did the lawyer act intentionally, knowingly, or negligently?)
>
> (3) What was the extent of the actual or potential injury caused by the lawyer's conduct? (Was there a serious or potentially serious injury?)

Lopatin, 462 Mich at 239-240 (quoting ABA Standards, p 5).

Next, the hearing panel examines recommended sanctions based the answers to these questions. Lopatin, 462 Mich at 240; ABA Sanctions, pp 3, 4-5.

Then, aggravating and mitigating factors are considered. Id.

And, in Michigan, the final step of the process involves a consideration of other factors, if any, which may make the results of the foregoing analytical process inappropriate for some articulated reason. As the Court explained in directing this Board and the panel's 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. [Lopatin, 462 Mich at 248 n 13.]

[Musilli, supra.]

I.

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

A. Duty (or Duties) Violated.

This case involves a violation of respondent's duties to the legal system. The parties and the hearing panel have identified Standard 6.3 (Improper Communications with Individuals in the Legal

System) as applicable, though there is disagreement over which particular standard under 6.3 governs this case.

B. Respondent's Mental State.

The Standards divide a lawyer's possible mental states into three categories: intent, knowledge, and negligence. The determination as to the respondent's state of mind in a particular case usually cannot be made without examining the potentially applicable standards. For example, in this case, the Administrator argues that respondent possessed intent, while respondent argues that he was merely negligent.

The three states of mind are defined as follows:

> "Intent" is the conscious objective or purpose to accomplish a particular result.
> "Knowledge" is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result.
> "Negligence" is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.

It follows from the foregoing definitions that one must know what the "result" is before a determination as to the state of mind can be made. Thus, we must look to the potentially applicable standards for the possible results. In this case, the Administrator argues for the applicability of Standard 6.31(b), which provides:

> Disbarment is generally appropriate when a lawyer:
>
> * * *
>
> (b) makes an ex parte communication with a judge or juror *with intent to affect the outcome of the proceeding*, and causes serious or potentially serious injury to a party, or causes significant or potentially significant interference with the outcome of the legal proceeding; [Emphasis added.]

The panel found Standard 6.32 applicable. It states:

> Suspension is generally appropriate when a lawyer engages in communication with an individual in the legal system *when the lawyer knows that such communication is improper*, and causes injury or potential injury to a party or causes interference or potential interference with the outcome of the legal proceeding. [Emphasis added.]

Finally, respondent argues that respondent was negligent, and, therefore, that Standard 6.33 should be applied. That standard reads:

> Reprimand is generally appropriate *when a lawyer is negligent in determining whether it is proper to engage in communication* with an individual in the legal system, and causes injury or potential injury to a party or interference or potential interference with the outcome of the legal proceeding. [Emphasis added.]

No reasonable argument can be made that respondent was "negligent in determining whether it [was] proper to engage in communication with [Judge Bronson]." Standard 6.33. The panel's supplemental report contains detailed findings of fact. Respondent admitted his awareness that the associate's memo was being sent only to Judge Bronson. Respondent claimed, however, that this was pursuant to a statement made by Bronson on the record at oral argument. The panel found, with ample evidentiary support, that respondent's testimony was not credible and that the statement was not made. Further, the panel clearly and unequivocally "refuse[d] to accept the notion that respondent would interpret a statement such as the one he claimed Bronson made as authorizing an ex parte submission." Supplemental Report, p 28 (appended to the Court's opinion, 462 Mich at 272). The panel's extensive findings simply cannot be squared with a negligent state of mind. Thus, the panel narrowed its focus to deciding whether the facts of this case fell within Standard 6.31(b) (recommending disbarment) or Standard 6.32 (recommending suspension).

Ultimately, the panel concluded that 6.32 should apply, apparently based in part on the panel's conclusion regarding respondent's state of mind. The Standards direct us and the panels to decide whether the ex parte contact was made with the "intent to affect the outcome of the proceeding," Standard 6.31(b), or was the product of some other state of mind. We are not certain we agree that this factor should always be dispositive. For example, we might view the violation to be equally as egregious if it were clear that the contact was *not* intended to alter the outcome (as measured by the votes of the judges), but that the contact was intended to enable a lawyer to effectively write the law in his or her practice area. However, even if we adopt the broadest possible reading of the word "outcome," we cannot say that the record lacks proper support for the panel's apparent finding that intent to affect the outcome of the Luszczynski appeal was not established. The panel found that "the substance of the memorandum had been presented in open court with opposing counsel present." The evidence was unrebutted in this regard, and the panel's findings have not been challenged by the Administrator. We agree with the panel that:

> This does not excuse the improper ex parte contact or diminish the significance of the fact that opposing counsel was not given the opportunity to respond in like kind to the arguments therein. However, as compared to an ex parte communication which raises an entirely new analysis or presents a resolution of issues to which opposing counsel was not privy, we find this type of communication somewhat less harmful to the system and the party aggrieved.

To a great degree, respondent's motive for sharing his associate's conversational memo, which simply rehashed points made and authorities raised at oral argument, remains a mystery. There has been no showing or argument that the analysis in that memo would not have appeared in Judge Bronson's majority opinion in any event. Testimony regarding the reputed laziness of the judge does not explain the sharing of the memo; his clerk testified that he could have written the opinion without help. Finally, the panel did not find, and the Administrator does not argue, that respondent and Bronson schemed to rig the result in this case. This is understandable in light of the proofs. It is possible that respondent was currying favor by being "helpful" to a judge, or that he was taking a shortcut instead of filing a supplemental brief with citations to the recent cases mentioned at oral argument. It is also *possible* that something more nefarious was afoot. But, that case has not been made and it is not proper to presume the worst in this matter simply because of Judge Bronson's corruption or alleged corruption in other cases.

Finally, we could argue that everything a competent advocate does is intended to "affect the outcome of the proceeding." However, this would obliterate the Standards' attempt to distinguish between ex parte contacts made with the intent to affect the outcome of a proceeding (Standard 6.31(b) and those made when known to be improper (Standard 6.32). In a case cited both in the commentary to Standard to 6.32 and by the Administrator at various points in this case, a Florida lawyer was suspended, not disbarred, for submitting an ex parte memorandum of law to two Florida Supreme Court Justices after the initial vote on the matter. Florida Bar v Mason, 334 So 2d 1 (Fla 1976).

C. Extent of Actual or Potential Injury.

In addressing the question of injury, the panel stated, in part:

> Here, we find it difficult to determine whether the memo was the cause of any actual or potential injury or interference in the outcome. This is in part because the evidence indicates that Judge Bronson may have reassigned the case to himself prior to receiving the memo. Also, the decision making power is diffused in the Court of Appeals, and one of the three Judges was leaning in Judge Bronson's direction at the post-oral argument conference. [Supplemental Report, p 32.]

In its opinion adopting the ABA Standards and remanding this case to us, the Court said:

> ABA Standards 6.31(b) and 6.32 discuss the circumstances under which misconduct involving an ex parte communication with a judge warrants a suspension or disbarment. The ADB, of course, is not bound by the hearing panel's application of the standards, particularly its assessment whether the ex parte communication caused serious injury or potentially serious injury to a party, or caused significant

> interference or potentially significant interference with the outcome of the legal proceeding. We are troubled by the hearing panel's narrow focus on the preliminary voting decisions of the other members of the Court of Appeals panel, without regard for the effect of a strongly reasoned proposed opinion on their decision whether to join Judge Bronson's opinion. In addition to potentially altering the Court of Appeals decision, an ex parte communication that affects the reasoning of the opinion may also injure a party by necessitating the expenditure of additional resources to obtain relief from this Court.
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> The ADB should also consider the harm to the administration of justice caused by respondent's misconduct. Shaman, Lubet & Alfini, Judicial Conduct and Ethics (3d ed), §§ 5.01, pp 159-160, describes the dangers associated with ex parte communications:
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> > Ex parte communications deprive the absent party of the right to respond and be heard. They suggest bias or partiality on the part of the judge. *Ex parte* conversations or correspondence can be misleading; the information given to the judge "may be incomplete or inaccurate, the problem can be incorrectly stated." At the very least, participation in *ex parte* communications will expose the judge to one-sided argumentation, which carries the attendant risk of an erroneous ruling on the law or facts. At worst, *ex parte* communication is an invitation to improper influence if not outright corruption.
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> [Lopatin, 462 Mich at 263-264.]

The Court's broader view is reflected in the Standards' definition of "injury" as "harm to a client, the public, *the legal system*, or the profession" (emphasis added). We have previously quoted a hearing panel's observation that, "Public confidence in the system is eroded when a litigant gains [ex parte] access to a judge about a pending matter." Grievance Administrator v Sheldon L. Miller, 90-134-GA (ADB 1991). And, the panel in this case recognized that "[e]very unlawful ex parte communication on the merits is injurious to the integrity of the legal system."

We are not presented with evidence of harm to the opposing party in this case, nor does the Administrator argue that the outcome of the Luszczynski case was actually interfered with. See Standards 6.31(b) and 6.32. Rather, the Administrator contends that respondent's actions "created serious potential to harm the opposing party, and to the legal process," Petitioner's Supplemental Brief on Discipline, p 10, and aptly sums up the nature of the conduct and its impact:

> The evidence establishes that respondent's actions, in concert with Judge Bronson, directly impacted the decision making process. In essence, respondent was afforded the opportunity to write a legal opinion which favored his client and reversed the trial court judgment. While the extent of the actual damage to the process may

> never be known, respondent's access to the process, disguised by Judge Bronson, threatened substantial harm and tainted the final decision in the matter. [*Id.* pp 12-13.]

Although the proofs do not specify any actual harm to a party, and do not establish that the judge's votes or the path of the law were in fact altered as a result of respondent's ex parte communication, we conclude that the injuries identified by the Court are present. Specifically, the *potential* harm to the opposing party is serious. And, there has been significant actual injury to the legal system in the form of diminished confidence in the impartial administration of justice.

II.

Applicable ABA Standard(s).

Although the Administrator asserts that respondent violated duties owed to both the public and the legal system, the Administrator argues that Standard 6.31(b) applies. This Standard is found in the section applicable to violations of duties owed to the legal system, and, as we have stated above, this case falls within the general Standard 6.3. The injury/potential injury factor is discussed in section I,C of this opinion. In this case, the respondent's state of mind is the dispositive factor. For the reasons stated in section I,B of this opinion, Standard 6.32 is applicable and a suspension is appropriate.

III.

Aggravating and Mitigating Factors

One aggravating factor in this case is respondent's substantial experience in the practice of law. Standard 9.22(i). Another is his lack of candor in testifying before the panel. Grievance Administrator v Shannon, 91-76-GA (ADB 1992) (citing ABA Standard 9.22(f)).

The mitigating factors are: absence of a prior disciplinary record (Standard 9.32(a)); respondent's good character and reputation as attested to by various prominent members of the bench and bar (Standard 9.32(g)); and, delay in the disciplinary proceedings (Standard 9.32(j)).

IV.

Appropriate Level of Discipline

We now consider the foregoing recommendations and factors, together with other determinants such as "Michigan precedent, and whether the Standards adequately address the effects of the misconduct or the aggravating and/or mitigating circumstances." Grievance Administrator v Ralph E. Musilli, supra, citing Lopatin, 462 Mich at 248 n 13.

Before considering Michigan precedent, we note the striking similarity between this case and Florida Bar v Mason, 334 So 2d 1 (Fla 1976). There, counsel for amici curiae in a utilities case which had been argued before the Florida Supreme Court discussed the case while golfing with the Justice (Boyd) assigned to write the majority opinion. He delivered a 14-page memorandum of law to Justice Boyd. Later, he delivered a copy of the memo to another Justice (Dekle), who actually ended up as the author of the majority opinion. Further, respondent made a second visit to the chambers of Justice Dekle and discussed the merits of the case. No copies of the memo were served on opposing counsel. No caption appeared on the memo. It was not filed with the clerk or docketed. Respondent Mason also refused to reveal his communications when asked about them by opposing counsel prior to the Court's decision. The specially convened Florida Court found that the incident "caused public mistrust of not only this Court but the system as a whole." 334 So 2d at 1. And, the Court adopted the referee's statement that "the fabric of substantive Florida jurisprudence was not impaired by the use of the memorandum." 334 So 2d at 3. However, a clerk testified that "substantial reliance was placed upon the memorandum in the preparation of the majority opinion." *Id.* For his several ex parte contacts, respondent Mason was "reprimanded and suspended for one year and thereafter until he proves rehabilitation . . . ." 334 So 2d at 7.

A Michigan attorney was disciplined for an ex parte contact regarding the amount of a jury verdict three days after a hearing on motions for jnov, new trial, and remittitur. Grievance Administrator v Sheldon L. Miller, supra. Respondent Miller was co-counsel for plaintiff and actually sought a reduction in the verdict for duplicative awards by the jury. Miller also self-reported immediately after the trial judge disqualified himself from further participation in the case. The Board quoted from the panel report:

> It is the panel's opinion that greater vigilance needs to be paid to Rule 3.5 of the Michigan Rules of Professional Conduct, which prohibits any communication between an attorney and a judge concerning a pending matter. The legal system is designed to be adversarial in nature, where each litigant has an equal opportunity to present evidence and arguments to the fact finder. Public confidence in the system is eroded when a litigant gains access to a judge about a pending matter, absent permission of his or her opponent. [Grievance Administrator v Sheldon L. Miller, supra]

Recognizing that the evidence might be subject to conflicting interpretations, and that the case was one of first impression in Michigan, the Board deferred to the panel's judgment as to the appropriate sanction in Miller. However, this caveat followed: "it should not be inferred that our decision to affirm the reprimand imposed by the panel establishes a standard for the level of discipline to be imposed in such cases in the future." Grievance Administrator v Sheldon L. Miller, supra.

Another Michigan case arises from the judicial discipline arena. For a case involving ex parte contacts, coupled with other serious misconduct, a judge was given a 60-day suspension. In Re Waterman, 461 Mich 1207 (1999). In that case, the district judge stayed writs of execution in a land contract forfeiture action on several occasions. Once, after an ex parte contact by a local politician, the judge stayed execution to give defendants additional time to move. He did so by directing the court officer not to execute the writ. As the Court stated: "There was no motion before Respondent at the time he authorized the stay, and no notice was provided to counsel for the plaintiff before Respondent acted. Additionally, no order staying the writ was issued." Arguably, Waterman involves more serious conduct. There, the judge intentionally granted relief favoring one party based upon an ex parte request. In this case, as noted above, it is simply not clear whether the outcome of the Luszczynski case was affected by respondent's communication with the judge. Nonetheless, we are not inclined to follow Waterman to the extent it suggests a short suspension is appropriate.

We believe greater discipline is required for two reasons. First, as the Florida Supreme Court stated in imposing a one year suspension for multiple communications on the merits of a case: "There cannot be any good motive associated with Respondent's ex parte contacts with the Court, or with his memorandum." We find a sanction at the Waterman level insufficient in light of the fundamental importance of attaining both the appearance and reality of fair and impartial adjudication by our legal system. Second, we find that respondent's preposterous justification constitutes a deceptive practice during the discipline process and outweighs the mitigating factors mentioned above. These two points, in combination, lead us to impose a suspension that will require respondent to satisfy the conditions for reinstatement set forth in MCR 9.123(B) and MCR 9.124. Accordingly, respondent shall be suspended for 180 days.

Board members Wallace D. Riley, Theodore J. St. Antoine, Nancy A. Wonch, Ronald L. Steffens, Marsha M. Madigan, M.D., and Marie E. Martell concur in this decision.

Board Members Michael R. Kramer, Grant J. Gruel, and Diether H. Haenicke and were absent and did not participate.