STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellant,

v

Robert H. Golden, P-14108,

Respondent/Appellee,

Case No. 96-269-GA

Decided: September 18, 2001

BOARD OPINION

A hearing panel ordered respondent suspended for 180 days for grabbing opposing counsel at a deposition in an attempt to recover an exhibit and maintaining a "headlock" for a brief period of time until counsel for a third party took possession of the exhibit. On review, this Board determined that a 60-day suspension was sufficient in this case. The Grievance Administrator sought leave to appeal to the Supreme Court. The matter was held in abeyance pending decision in other discipline matters before the Court. Grievance Administrator v Golden, 607 NW2d 727 (2000). In Grievance Administrator v Lopatin, 462 Mich 235; 612 NW2d 120 (2000), the Court adopted the American Bar Association's Standards for Imposing Lawyer Sanctions (ABA Standards) on an interim basis. This matter has now been remanded to us for reconsideration and application of the ABA Standards. Grievance Administrator v Golden, 463 Mich 1211; 618 NW 2d 591 (2000).

In applying the Standards following Lopatin, we have generally followed the sequence suggested by the Standards themselves:

> First, the following questions must be addressed: (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?); and, (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?).
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> The second step of the process involves identification of the applicable standard(s) and examination of the recommended sanctions. Third, aggravating and mitigating factors are considered. Finally, "panels and the Board must consider whether the ABA

> Standards have, in their judgment, led to an appropriate recommended level of discipline in light of factors 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, 98-216-GA (ADB 2000), supra, p 5, citing Lopatin, 462 Mich at 248 n 13. [Grievance Administrator v Fink, 96-181-JC (ADB 2001).]

The questions posed by the Standards regarding the duty (or duties) violated, the lawyer's mental state, and the actual or potential injury caused by respondent are mainly directed toward assisting in the selection of the appropriate recommended sanction. Those recommendations are found in Standards 4 through 8, and frequently, but do not always, reference factors such as the lawyer's state of mind or the degree of injury. The Administrator argues, on remand, that Standards 5.12, 6.22 and 7.2 indicate that a suspension would be appropriate in this case. Respondent concedes that his conduct "would seem to be classified as a violation of an attorney's duty to maintain personal integrity [Standard 5.0], and may warrant a 'point of beginning' sanction under 5.12 of suspension."

Although there is agreement that a suspension is appropriate in this case, we will briefly consider these three questions and their answers for guidance in determining the appropriate length of the suspension to be imposed.[1]

While respondent's conduct could be characterized as a violation of duties owed to the legal system and profession, we agree with the parties that Standard 5.12 is also relevant and affords some guidance. In fact, in a recent deposition fracas case, we discussed Standard 5.12. Grievance Administrator v Fink, supra. There, the respondent shoved another attorney who was the deponent. Here, respondent persisted in grabbing the exhibit even after the suggestion was made that a phone call to the judge might resolve the dispute. Respondent then grabbed opposing counsel in an attempt to recover the exhibit. When another attorney at the deposition obtained possession of the exhibit, respondent "squared off" with him and attempted to physically take possession of the exhibit before finally coming to his senses and declaring the deposition concluded. Though the tussle was not prolonged, it was of sufficient duration for us to conclude that respondent possessed the state of

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[1] Our earlier opinion reflects our decision that a suspension was required to advance the goals of the discipline system. Although we did not expressly derive this result from application of the Standards, the opinion brought our caselaw to a similar point by announcing that the presumptive sanction in such cases would be a suspension. And, like the Standards, our opinion did not attempt to foresee every pertinent factor and fix in advance the length of the suspension based on the presence of a certain number of such factors. Rather, the Board assessed the conduct in this case, together with all of the circumstances, and entered an order deemed sufficient to protect the public, the courts, and the legal profession. As each panel weighs the nature of the misconduct and the attendant circumstances in light of precedent, proportionality, and the stated objectives of the discipline system, caselaw – now extant within the framework of the Standards – will accumulate and thereby delineate the appropriate range of discipline for like cases.

mind referenced in Standard 5.12, i.e., respondent knowingly engaged in assaultive conduct.[2] And, respondent was sufficiently aggressive that we conclude his conduct crossed the threshold so as to "seriously adversely reflect on [his] fitness to practice." Standard 5.12. Finally, the injury or potential for injury is a pertinent inquiry even though this factor is not referenced in Standard 5.12. The record reveals no physical injury to respondent's opposing counsel. Of course, the potential for such injury is by definition present when an assault occurs. Moreover, interference with a legal proceeding is cognizable under the Standards[3] and constitutes misconduct.[4]

Our previous opinion sets forth in detail respondent's conduct at the deposition giving rise to this discipline matter. In deciding the appropriate level of discipline, we said:

> We are not in a position to disagree with the panel's assessments regarding respondent's attitude, and the need for significant discipline in this case. However, in exercising our overview function to assure consistency and continuity, we are unable to conclude from the record that it is necessary for respondent to be suspended for 180 days and be required to petition for reinstatement under MCR 9.123 & 9.124. Accordingly, we modify the panel's order and suspend respondent for 60 days.
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> Our decision to impose a suspension of 60 days -- even though respondent has practiced with an unblemished record for over 37 years and this was an isolated incident which ended without physical injury to anyone -- reflects our unwillingness to tolerate this type of behavior. We will continue to review and decide these matters on a case-by-case basis, as is the rule in attorney discipline proceedings. However, we will not forget that persons involved in the legal process are engaged in an undertaking vital to our society.
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> When a client counsels with an attorney or when a person participates in some phase of litigation, the greater end involves -- and should strengthen -- the rule of law. We cannot ask all citizens to conduct their legal affairs and the pursuit of justice in accordance with a process which the lawyers themselves abandon when it becomes inconvenient. For these reasons lawyers can expect that conduct rising to the level of a physical assault while performing their legal duties will generally result in a suspension. This does not mean

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[2] Standard 5.12 provides that:

> Suspension is generally appropriate when a lawyer knowingly engages in criminal conduct which does not contain the elements listed in Standard 5.11 [which focuses on dishonesty] and that seriously adversely reflects on the lawyer's fitness to practice.

[3] See Standard 6.22.

[4] See Fink, supra, p 2, citing Grievance Administrator v Leonard B.Segel, 95-210-GA (ADB 1998) (finding conduct prejudicial to the proper administration of justice in violation of MRPC 8.4(c) and MCR 9.104(1)).

> that a suspension may never be imposed for abusive or inappropriate conduct not involving physical contact. Nor does it mean that a suspension will be warranted whenever an attorney touches another person involved in the legal process. However, we hereby serve notice on the profession that its members should, before acting, reflect on the fact that these cases will be taken seriously by this Board.

The Administrator argues that respondent should be suspended for 180 days in light of his assault upon another attorney at a deposition, without provocation, and because his demeanor before the panel suggested respondent was likely to engage in similar conduct in the future. In the alternative, the Administrator argues that, if respondent is not suspended for 180 days, he should receive a suspension requiring him to meet the conditions set forth in MCR 9.123(B)(1)-(7). Respondent does not disagree that a suspension may be appropriate, but contends that the Standards do not prescribe the length of the suspension and the Board's previous decision to impose a 60-day suspension should be reaffirmed.

The Administrator argues that the most significant aggravating factor in this case is respondent's refusal to acknowledge the wrongfulness of his conduct. Standard 9.22(g). The panel did not specifically reference Standard 9.22(g), but it discussed its perception of respondent's attitude at some length:

> While finally conceding that the attack should not have occurred, Mr. Golden argues that Mr. Segal's verbal provocations, in effect assailing Mr. Golden's integrity, were the sole cause of and somehow justified what he did. The panel believes Mr. Golden's view is wrong and would have found misconduct even if there had been some degree of provocation. However, the deposition transcript does not support Mr. Golden's claim of significant provocation. There are no "fighting words." Nor did Mr. Segal use any language that a reasonable lawyer would have found provocative to the point of justifying a physical attack.
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> At the end of his argument in the discipline phase, Mr. Golden offered a pro forma apology. The apology did not show any understanding that his conduct was not excusable or how disruptive it was of the judicial process. It was inconsistent with his combative demeanor throughout the hearing. If the incident was indeed an isolated one to this stage of Mr. Golden's professional career, the panel concludes that Mr. Golden would, absent the threat of serious discipline, feel justified in repeating the conduct if he should be similarly "provoked" in the future. The panel believes the discipline imposed granted Mr. Golden the maximum mitigation to which he is entitled on an isolated incident theory. [Hearing Panel Report, p 5.]

This passage from the panel's report touches upon all of the key factors in this case: respondent's state of mind or view of the events that led to his conduct; the cause(s) of the

misconduct and likelihood of recurrence; and respondent's past record. These factors are interrelated and figure prominently in the critical decisions regarding how this conduct reflects on respondent's fitness to practice and what level of discipline is necessary for the protection of the public, other members of the bar and the legal system. Because the Standards do not recommend specific suspension lengths, it is those considerations which almost always drive the decision as to the appropriate level of discipline.

The interrelationship between the foregoing factors can be seen by examining a factor in aggravation, substantial experience in the practice of law (Standard 9.22(i)), and a factor in mitigation, absence of a prior disciplinary record (Standard 9.32(a)), in connection with the undisputed fact that respondent has no other history of such conduct since his admission to the bar in 1961. While we must afford great deference to a panel's observations and findings based on demeanor, we also recognize that the realization and acceptance of the wrongfulness of certain conduct may come later for some than for others. Respondent's appearances before us and his decision to accept the Board's order of suspension without seeking a stay or further appeal do not evidence the stubbornness and combativeness respondent previously displayed.

At oral argument, counsel for the Administrator contended that the Standards recommend a suspension of at least 180 days in this case, and, generally, in all cases. This argument is based on Standard 2.3, part of a section in the Standards which describes sanctions and remedies ordinarily imposed by discipline agencies and courts. It reads:

> **2.3 Suspension**
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> **Suspension is the removal of a lawyer from the practice of law for a specified minimum period of time. Generally, suspension should be for a period of time equal to or greater than six months, but in no event should the time period prior to application for reinstatement be more than three years. Procedures should be established to allow a suspended lawyer to apply for reinstatement, but a lawyer who has been suspended should not be permitted to return to practice until he has completed a reinstatement process demonstrating rehabilitation, compliance with all applicable discipline or disability orders and rules, and fitness to practice law.**
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> ***Commentary***
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> While the Model Rules for Lawyer Disciplinary Enforcement (see MRLDE 25) currently provide for suspensions of less than six months, short-term suspensions with automatic reinstatement are not an effective means of protecting the public. If a lawyer's misconduct is serious enough to warrant a suspension from practice, the lawyer should not be reinstated until rehabilitation can be established. While

> it may be possible in some cases for a lawyer to show rehabilitation in less than six months, it is preferable to suspend a lawyer for at least six months in order to ensure effective demonstration of rehabilitation. In reality, a short-term suspension functions as a fine on the lawyer, and fines are not one of the recommended sanctions in the MRLDE.
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> The amount of time for which a lawyer should be suspended, then, should generally be for a minimum of six months. In no case should the time period prior to application for reinstatement be more than three years. The specific period of time for the suspension should be determined after examining any aggravating or mitigating factors in the case. At the end of this time period the lawyer may apply for reinstatement, and the lawyer must show: rehabilitation, compliance with all applicable discipline or disability orders and rules, and fitness to practice law (see MRLDE 25).

Although this section of the Standards and its commentary mention the Model Rules of Lawyer Disciplinary Enforcement, no reference is made to the fact that the Rules expressly provide for suspensions of less than six months and "automatic" reinstatement therefrom. See MRLDE 10 A (2) (suspensions shall be "for an appropriate fixed period of time not in excess of three years") and MRLDE 24 (providing for reinstatement at end of suspension upon filing of affidavit attesting to compliance with order of discipline). The MRLDE were adopted by the ABA House of Delegates in August 1993, and amended in 1995, 1996, and 1999.

Our rules also expressly provide for:

> suspension of the license to practice law in Michigan for a specified term not less than 30 days, with such additional conditions relevant to the established misconduct as a hearing panel, the board, or the Supreme Court may impose, and, if the term exceeds 179 days, until the further order of a hearing panel, the Board, or the Supreme Court. [MCR 9.106(2).]

While this Board has frequently referred to the Standards since their adoption by the ABA in 1986, and the Court adopted the Standards on an interim basis in its July 2000 Lopatin decision, MCR 9.106(2) remains unmodified. We are not prepared to conclude that the Court has determined that suspensions of less than 180 days are no longer appropriate or that all suspensions should have a presumptive minimum length of 180 days.

Even were we to follow the suggestion that suspensions should be for a period equal to or greater than 180 days (thereby triggering reinstatement proceedings before a panel), we would conclude that such a suspension is not warranted by this record. Of course, that is not to say that this Board endorses respondent's conduct. Nor is respondent "getting away with" anything. A suspension of 60 days is not insignificant for a practitioner with no other record of misconduct since his admission in 1961. We thoroughly condemn respondent's conduct, as did the panel and our

predecessors on this Board, and, in order to provide an extra measure of protection for the public, members of the bar, and the courts, we modify the order of discipline to impose certain conditions. Respondent has complied with the order suspending him for 60 days and has been reinstated pursuant to MCR 9.123(A). We consider the Administrator's request for an order again suspending respondent and requiring him to petition for reinstatement in accordance with MCR 9.123(B) and 9.124 to be excessive discipline in light of this record. However, we deem it appropriate to guard against the possibility of future incidents (even though the misconduct transpired over five years ago) and therefore will order respondent to be subject to the following conditions:

A. Respondent shall seek treatment by a qualified mental health professional acceptable to the Grievance Administrator regarding anger management and such other issues related to, or potential causes of, the misconduct in this case who shall: (1) disclose to the Administrator on at least a quarterly basis information pertaining to the nature of respondent's compliance with any treatment plan established with respect to respondent's condition; (2) promptly report to the Administrator respondent's failure to comply with any part of such treatment plan; and (3) respond to any inquiries by the Administrator regarding respondent's mental or emotional state or compliance with any treatment plans; and,

B. Within one year from the date of this opinion and accompanying order, a hearing shall, at the option of the Administrator, be scheduled before a master at which hearing the Administrator shall have the opportunity to argue that good cause exists for further supervision and/or discipline. The Administrator may, in his discretion, waive the hearing, in which case the conditions will be deemed satisfied and discipline fully administered in this matter.

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

Members Diether H. Haenicke and Michael R. Kramer were absent and did not participate.