STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellant,

v

Ralph E. Musilli, P 18132, Case No. 07-88-JC;
Walter L. Baumgardner, Jr., P 28935, Case No. 07-89-JC

Respondents/Appellees,

Decided: October 18, 2010

Appearances:

Patrick K. McGlinn, for the Grievance Administrator, Petitioner/Appellant.
John F. Brennan (before hearing panel and on briefs on review); and
Scott E. Combs (oral argument on review), for the Respondents/Appellees.

BOARD OPINION

This proceeding was commenced on May 30, 2007, when the Grievance Administrator, in accordance with MCR 9.120, filed the Oakland Circuit Court's December 14, 2005 Order of Criminal Contempt of Ralph Musilli and Walter Baumgardner, and Judgment for Damages, Fines, And Imprisonment. The hearing panel ordered that respondents be suspended for 30 days, with credit given for the six days each respondent served in the Oakland County Jail for their criminal contempt convictions. The respondents have filed affidavits pursuant to MCR 9.119 and 9.123 indicating that they ceased practicing law in Michigan for the period specified in the panel's order of suspension and otherwise complied with the hearing panel's order. Because we conclude that suspension of a length sufficient to trigger reinstatement proceedings under MCR 9.123(B) and 9.124 is warranted, we increase the suspensions ordered in this case to 180 days, with credit for the 24 day suspensions served by respondents.

Respondents were members of a law firm (Musilli, Baumgardner, Wagner & Parnell, P.C.) which sued General Motors on behalf of a client and obtained a contingent fee of $1,057,909.80. Attorney Warren Droomers sued the Musilli firm for failure to pay a referral fee. Prior to a bench

trial on Droomers' claim,[1] Oakland Circuit Judge Fred M. Mester entered an order, dated December 19, 2002, directing the firm to deposit $352,636.60 into escrow and to refrain from transferring any assets out of the corporation until that sum had been placed in escrow. Specifically, the order says, in pertinent part:

> IT IS HEREBY ORDERED that Defendant Musilli, Baumgardner, Wagner & Parnell, P.C. shall pay $352,636.60 into neutral interest bearing escrow under the Court's supervision within 21 days.
>
> IT IS FURTHER ORDERED that Defendant Musilli, Baumgardner, Wagner & Pamell, P.C. is enjoined from transferring any firm assets out of the corporation until the $352,636.60 is paid into escrow as ordered above. [Exhibit 11 - December 19, 2002 order.]

After the bench trial, Judge Mester dismissed the breach of contract claim for $352,636.60 but found that the firm owed Droomers the sum of $240,000 for his services. Respondents were eventually found in contempt for failure to comply with the December 2002 order, and the contempt was ultimately categorized as criminal, after an appeal to the Michigan Court of Appeals in 2005.[2]

In May 2007, the Grievance Administrator, pursuant to MCR 9.120, filed the circuit court's contempt order. The circuit court's order states that:

> [Respondents] flagrantly violated the Court's December 19, 2002 Order. Walter Baumgardner and Ralph Musilli transferred assets in violation of the December 19, 2002 Order, permitted the transfer of assets in violation of the December 19, 2002 Order, accepted the transfer of Musilli Firm assets in violation of the December 19, 2002 Order, and in other ways failed to cause the Musilli Firm to comply with the December 19, 2002 Order. [Exhibit 2 – December 14, 2005 order of criminal contempt.]

The order further recites that "in the underlying civil case, the Court awarded judgment in Plaintiff's favor in the amount of $312,297.40 in October 2003," which the court found had grown to $431,350 because of case evaluation sanctions and interest. The court then found "that the contemptuous actions of Ralph Musilli and Walter Baumgardner in violation of the Court's

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[1] Mr. Droomers died while the action was pending and his estate was substituted as the plaintiff.

[2] See Exhibit 1 – *Droomers v Parnell, et. al.*, unpublished opinion per curiam of the Court of Appeals, issued June 30, 2005 (Docket No. 253455) (affirming finding of contempt and remanding for clarification as to whether the trial court intended to impose criminal or civil sanctions).

December 19, 2002 Order made satisfaction of this judgment impossible." The order added $16,872.83 in attorney fees, the statutory fine of $250, and ordered that each respondent serve 30 days in the Oakland County Jail.

Also attached to the notice commencing this matter is an order reinstating the judgment of conviction (signed May 16, 2007, and filed May 17, 2007) which was entered after settlement negotiations led to the dismissal and subsequent reinstatement of the contempt action.

In September 2007, the Administrator and respondents stipulated to adjourn the hearing in this discipline proceeding pending resolution of another appeal. On February 12, 2009, the Court of Appeals issued a per curiam opinion affirming the criminal contempt order/judgment (see Exhibit 5).

The hearing in these proceedings was then re-noticed for July 15, 2009, and a pre-trial order requiring the exchange of witness lists (with anticipated testimony) and documentary evidence by June 1, 2009, and objections thereto by June 15th. Petitioner's Objection to Respondent's Documentary Evidence Submission states that the Administrator received a letter from John F. Brennan (1) indicating that he was representing respondents, (2) stating that he would call no witnesses other than those listed by the Administrator, and (3) providing documentary evidence of the pendency of an application for leave to appeal to the Michigan Supreme Court.

Three witnesses testified at the hearing below: Dean Googasian, Ralph Musilli, and Walter Baumgardner. Eleven exhibits were introduced, all by the Administrator.[3] Among them were the two Court of Appeals opinions (Exhibits 1 and 5), the circuit court orders relating to the criminal contempt, evidence of prior misconduct, and, finally, the circuit court's December 19, 2002 Order Granting Plaintiff's Motion for Relief Under the UFTA (Uniform Fraudulent Transfer Act).

The panel's report explains concisely the nature of the proceeding in a case based on a criminal conviction and in this case in particular:

> Commission of the offense of criminal contempt is conclusively established by respondents' acknowledgment and by the certified copies of the Oakland County Circuit Court judgments of conviction filed by the Administrator. MCR 9.120(B)(2). At the hearing, this panel was responsible for inquiring into the specific facts of this case and imposing discipline in accordance with those facts, the

[3] Respondents attached various documents to a pleading submitted to the panel but not filed with the office of the Attorney Discipline Board.

> surrounding circumstances and the American Bar Association's Standards for Imposing Lawyer Sanctions. *Grievance Administrator v Lopatin*, 462 Mich 235; 612 NW2d 120 (2000). . . . The focus of this panel is the appropriate level of discipline; we cannot consider questions as to the validity of the conviction, alleged trial errors, and the availability of appellate remedies. MCR 9.120(B)(3). [HP Report, pp 2, 3-4.]

As we have noted above, the panel suspended respondents for 30 days, with credit for the six days spent in the Oakland County Jail.

The Administrator argues that the panel erred in selecting ABA Standard 6.22 instead of 6.21 as a starting point for considering the appropriate level of discipline.[4] In the alternative, the Administrator contends that a suspension greater than the 30-day suspension imposed by the panel is warranted. Opposing the Administrator's request, respondents argue that the discipline imposed by the hearing panel is more than sufficient.

Standard 6.21 and Standard 6.22, as the Administrator points out, both involve knowing violation of an obligation under the rules of a tribunal. As to their state of mind in failing to comply

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[4] Standard 6.2 reads as follows:

> 6.2 Abuse of the Legal Process
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> 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 failure to expedite litigation or bring a meritorious claim, or failure to obey any obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists:
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> 6.21 Disbarment is generally appropriate when a lawyer knowingly violates a court order or rule with the intent to obtain a benefit for the lawyer or another, and causes serious injury or potentially serious injury to a party or causes serious or potentially serious interference with a legal proceeding.
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> 6.22 Suspension is generally appropriate when a lawyer knows that he or she is violating a court order or rule, and causes injury or potential injury to a client or a party, or causes interference or potential interference with a legal proceeding.
>
> 6.23 Reprimand is generally appropriate when a lawyer negligently fails to comply with a court order or rule, and causes injury or potential injury to a client or other party, or causes interference or potential interference with a legal proceeding.
>
> 6.24 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in complying with a court order or rule, and causes little or no actual or potential injury to a party, or causes little or no actual or potential interference with a legal proceeding.

with the circuit court's order, respondents offer a welter of inconsistent arguments, i.e., that they openly refused[5] to obey the order, that they really did not think the order could mean what it said, and that they did not obey it because they could not do so - they didn't have the funds. If the latter were true, that could have been a basis for a motion to the court for relief from its order, but there has been no argument that this straightforward approach was taken. To the contrary, respondents argue that they did *not* raise this argument with the trial or appellate courts.[6]

MRPC 3.4(c) exempts from its proscription against disobeying the obligations of a tribunal "an open refusal based on an assertion that no valid obligation exists." Respondents argue, in a conclusory fashion, that an open refusal is established by their motion for reconsideration and appeal from the escrow order.[7] We disagree; an appeal or motion for reconsideration does not, by itself, inform anyone that the order is not being complied with pending reconsideration or review. Moreover, the open refusal argument runs headlong into respondents' other two arguments, i.e., that they could not afford to comply and/or that they did not know that they really had to.[8] The following passages from respondents' brief demonstrate the incoherence of their arguments and explains, to some degree, why court after court has rejected every argument they have advanced:

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[5] Respondent's rely on the exception found in Standard 6.2 for "an open refusal [to obey an obligation under the rules of a tribunal] based on an assertion that no valid obligation exists" (see n 4, *supra*, for the text of Standard 6.2). The standard's reference is no doubt based on the language of MRPC 3.4(c). See n 12, *infra*, for the text of that rule.

[6] At page 11 of their brief on review, respondents contend:

> While Respondents sincerely believe(d) that the order was illegal or invalid for any of a number of reasons, as set forth in their motion for reconsideration (Exhibit F) and their interlocutory appeal (Exhibit G), that is not why they did not comply with the escrow order. They did not comply because the firm could not fund an escrow account as ordered by the court and continue its operations and defense as well.

[7] See, e.g., Respondents' Brief, pp 3, 5, and 9.

[8] The Administrator's motion to strike certain attachments to respondents' brief will be denied as moot. Respondents assert, and the Administrator does not dispute, that attachment G (respondents' February 2003 application for leave to appeal from the circuit court's escrow order) was the only one not provided to the panel. Respondent's brief on review demonstrates that attachment G is offered either as a collateral attack on the judgment of conviction filed in this matter or to support the argument that respondents' conduct amounted to an "open refusal" and thus was immune from discipline. We will not revisit the bases for respondents' convictions, and our disposition of respondents' other arguments are not affected by the disputed attachment.

> Respondents openly refused to comply with the escrow order based on an assertion the order was invalid . . . . Respondents admittedly did not advise the Court on the record that the firm, if it commenced funding of the escrow to the exclusion of all of its other obligations, it would be would be [sic] hopelessly insolvent and would have to cease its operations, its defense and seek protection in bankruptcy. Respondents acted on the belief the professional corporation was allowed to continue to run in the ordinary course and continue its defense and the inability to do so and fund the escrow as well was a valid defense. . . . Respondents regret not advising the court on the record upon the entry of the escrow order that the firm was insolvent and incapable of complying. Respondents have made this apology to the court and opposing counsel on more than one occasion. However, there has been no showing of a willful refusal to obey a court order, which is a necessary component of criminal contempt.[9]

With respect to the factor of injury, the Administrator argues that respondents "caused serious or potentially serious interference to the proceeding" by "declining to escrow the funds." Respondents argue that the firm was insolvent at the time the court entered the December 19, 2002 order and remained so thereafter. Thus, respondents appear to argue that their noncompliance with the 2002 order was not really a source of injury to Droomers' estate. The panel found that, "With respect to actual or potential injury, it is clear that respondent's misconduct was not simply failing to satisfy a legal judgment against the law firm and consequently harming the judgment holder. In addition, respondents abused the legal process by their flagrant affront to the court's authority."[10]

An additional factor in Standard 6.21, "intent to obtain a benefit for the lawyer or another," often fails to provide a helpful distinction between the type of conduct covered by Standard 6.21 and Standard 6.22. It is hard to conceive of a situation in which a lawyer would knowingly violate a rule or court order without the intent to obtain a benefit for someone. Indeed, the commentary to Standard 6.22, which calls for suspension, cites as illustrative "the case of lawyers who do not comply with a divorce decree ordering spousal maintenance or child support." The knowing violation of a court order to pay funds in that situation, with its attendant financial benefits, is not dissimilar to the misconduct in this matter.

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[9] Respondents' Brief, pp 7, 9.

[10] HP Report, p 4.

We are not persuaded that the panel's decision to apply Standard 6.22 in this matter was error.

The Administrator also argues that, even if revocation is not the proper discipline, a suspension of greater than thirty days should be imposed. We agree.

The hearing panel recited the aggravating and mitigating factors in this case. Noting that both respondents had prior discipline, it found those cases too remote to have an impact on the ultimate sanction here. Although it did not find respondents' conduct dishonest, the panel concluded that, "Respondents were purely driven by selfish motive as their actions display no regard for the court or the rights of the judgment holder."[11] Respondents offered no remorse, but instead failed to acknowledge the wrongfulness of their conduct. However, the panel found that respondents cooperated during the discipline proceedings, had suffered other penalties, and "acknowledged the many years respondents have been participating in the practice of law and the character and reputation they have garnered." The Administrator takes issue with the discounting of prior misconduct and the sufficiency of evidence regarding good character and reputation, among other things.

Viewing the nature of the misconduct in its entirety, and weighing the aggravating and mitigating factors in this case, we conclude that a suspension of a length sufficient to require reinstatement proceedings in accordance with MCR 9.123(B) and MCR 9.124 is required. The Administrator has requested a suspension of at least three years. Respondents oppose this request. No authority has been offered for the Administrator's position. Respondents cite an inapposite panel order reprimanding a practitioner for a misdemeanor assault and battery conviction.

We find that the relatively recent criminal contempt case of *Grievance Administrator v Keith J. Mitan*, 06-74-GA (ADB 2008), offers some guidance. There, the respondent deliberately violated a court order contrary to MRPC 3.4(c)[12], and compounded this misconduct with dishonesty to the tribunal. Respondent Mitan was suspended for one year.

Considering all of the aggravating and mitigating factors in this case, as well as the nature of the misconduct and the attendant circumstances, we conclude that respondents should each be

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[11] HP Report, p 4.

[12] MRPC 3.4(c) provides that an attorney shall not "knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists."

suspended for 180 days, and that credit should be given for the 24 days during which they were suspended pursuant to the panel's order.

Board members Thomas G. Kienbaum, Andrea L. Solak, Carl E. Ver Beek, Craig H. Lubben, James M. Cameron, Jr., and Sylvia P. Whitmer concur in this decision.

Board Member William J. Danhof dissented and would affirm the order of the hearing panel.

Board members William L. Matthews, C.P.A. and Rosalind E. Griffin, M.D. did not participate.