Grievance Administrator
State of Michigan
Attorney Grievance Commission

Petitioner/Appellant,

v

Dennis W. Koltunchik, P 36255

Respondent/Appellee

92-128-GA

Issued: November 15, 1993

BOARD OPINION

The Grievance Administrator filed a petition seeking review of a hearing panel order suspending the respondent's license to practice law for a period of two years. The Attorney Discipline Board has considered the nature of the respondent's misconduct and the mitigating and aggravating factors. In light of these factors, we conclude that increased discipline is warranted. The respondent's license to practice law shall be suspended for a period of three years.

At the commencement of the hearing panel proceedings, the parties advised the panel that the respondent was prepared to make certain admissions. The respondent was sworn and admitted that he represented two clients in a forfeiture action brought against their home by the United States Attorney for the Eastern District of Michigan. On May 16, 1991, the clients appeared before an Assistant United States Attorney in Detroit for the purpose of giving sworn depositions. The respondent accompanied his clients to those depositions. The respondent admitted that:

> 1. He advised his clients not to admit to the sale of any illegal substances, although he knew that they were involved in the sale of marijuana.
>
> 2. He advised his clients not to admit to possessing any quantities of illegal substances in excess of what would be considered to be for personal use, although he knew that his clients were not using those amounts personally, that they did have excessive quantities and that they were, in fact, selling marijuana.
>
> 3. He knew his clients were giving false testimony at the deposition before the U.S. Attorney on May 16, 1991.
>
> 4. He did not counsel his clients to correct their testimony so that it would be truthful.

> 5. The false testimony given by the respondent's clients concerning the sale of illegal substances was consistent with the advice provided by the respondent regarding how they should answer those questions.
>
> 6. The respondent did not inform the U. S. Attorney that his clients offered false testimony at the deposition.

It is difficult to overstate the seriousness of the respondent's offense. In disbarring an attorney who solicited others to commit perjury and knew that the testimony of two witnesses before a grand jury was false, the California Supreme Court stated:

> "For an attorney at law to actively procure or knowingly countenance the commission of perjury is utterly reprehensible. It is far more reprehensible within the profession than when committed by one who is not a lawyer. It marks such person as unworthy of the office of attorney. Above all other professions, members of the bar should be most scrupulous in their honesty; scrupulous in their own conduct and in that which they should not only advise, but exact of their employees, their clients, and the witnesses they present in court". In re: Allen 344 P2d 609, 612 (California 1959).

In Board of Overseers of the Bar v Dineen, 481 A2d 504 (ME 1984) an attorney was disbarred for allowing a client to give false testimony under oath. There, the court said:

> "While the lawyer has a duty to act zealously on his client's behalf, that duty is subject to ethical limitations which the lawyer may ignore at his peril. Among these is the affirmative obligation to inform the court of the falsity of a client's assertions."

Indeed, our Supreme Court, in ordering the disbarment of an attorney who had not only been convicted of the felony of tax evasion but had counselled a client to commit perjury on his behalf, declared:

> "The legal system is virtually defenseless against the united forces of a corrupt attorney and a perjured witness. Thus, for an attorney at law to actively procure or knowingly countenance the commission of perjury is utterly reprehensible," Matter of Grimes 414 Mich 483, 494 (1982)"

However, in Grimes, supra, the Supreme Court went on to note that:

> "In reviewing the discipline imposed in a given case, we are mindful of the sanctions meted out in similar cases, but recognize that analogies are not of great value.
>
> As a hypothetical proposition, we find dubious the notion that

> judicial or attorney misconduct cases are comparable beyond a limited and superficial extent. Cases of this type generally must stand on their own facts". (State Bar Grievance Administrator v DelRio, 407 Mich 336, 350; 258 NW2d 277 (1979).

Absent our decision to give deference to the hearing panel's consideration of the mitigating factors in this case, the respondent's conduct could be expected to result in revocation. In addition, this case presents the aggravating factor of respondent's prior misconduct which resulted in an Order of Probation which was in effect when the respondent appeared with his clients at the deposition in May 1991.

Nevertheless, we recognize, as did the panel, that the respondent's continued rehabilitation from his active alcoholism, the character testimony regarding his reputation in the legal community, and his candor in making the admissions to the hearing panel were factors to be considered in mitigation. A suspension of three years is appropriate in this case.

Board members C. Beth DunCombe, Elaine Fieldman, Miles A. Hurwitz and Theodore P. Zegouras join in this decision

Board Members John F. Burns and Linda S. Hotchkiss M. D. would increase discipline to a suspension of five years

Board Member George E. Bushnell, Jr. did not participate in the deliberations or decision in this case.