STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellant/Cross-Appellee,

v

Murdoch Hertzog, P 14913,

Respondent/Appellee/Cross-Appellant,

Case Nos. 06-76-JC; 06-77-GA

Decided: November 23, 2009

Appearances:

Cynthia C. Bullington, for Grievance Administrator, Petitioner/Appellant/Cross-Appellee
Michael Alan Schwartz, for the Respondent/Appellee/Cross-Appellant

BOARD OPINION

On July 21, 2008, Tri-County Hearing Panel #105 issued an order suspending respondent's license to practice law for a period of 120 days. The Grievance Administrator ("the Administrator") filed a petition for review with the Attorney Discipline Board ("the Board") requesting that discipline be increased to a suspension for a period of at least one to three years. Respondent filed a cross-petition for review seeking the vacating of the suspension order and a dismissal of the formal complaint due to various claims of error or, in the alternative, a reduction of the level of discipline to a reprimand, or less.

After review, we affirm the hearing panel's findings of misconduct but increase discipline to a suspension of 180 days.

I. Procedural and Factual History

The underlying facts began on March 29, 2001, when respondent entered into a plea agreement in *People v Hertzog*, Macomb County Circuit Court Case No. 001391-FH in which he offered to enter a plea of guilty to the misdemeanor charge of assault and battery (MCL 750.81) in exchange for the dismissal of the charge of fourth-degree criminal sexual conduct. Respondent's plea was taken under advisement in order to confer with the victim (Cammie P), who was later

contacted and who did not object to the plea. At the May 7, 2001 sentencing hearing, Macomb County Circuit Judge Mark Switalski accepted respondent's plea. Respondent's misdemeanor conviction was not reported to the Grievance Administrator or the Board at that time.

In March of 2004, a former client of respondent's, Cheryl B, filed a request for investigation of respondent. As part of his investigation, the Administrator sent a February 10, 2006 letter to respondent which requested a full and fair statement concerning the events upon which the 2001 conviction was based. Respondent was also requested to address his failure to respond accurately on dues statements to the question concerning convictions, and his failure to report the conviction to disciplinary authorities as required under MCR 9.120(A). In his February 21, 2006 reply to that letter, respondent stated that the 2001 conviction resulted from his offer to plead guilty to simple assault with an agreement that his conviction would be expunged after five years. He stated that the plea was under advisement. He admitted his failure to report the conviction, but attributed his lapse to his assumption that the prosecutor's office had reported the conviction. Lastly, respondent stated that, in view of the expungement agreement and the plea taken under advisement, he believed that no further reporting by him was necessary.

On July 11, 2006, the Administrator filed with the Board a certified copy of the judgment of respondent's 2001 conviction under the procedure described in MCR 9.120(B)(3). He also filed a four-count formal complaint: Count One alleged that respondent committed professional misconduct by failing to provide written notification to the Grievance Administrator and the Board of his conviction within 14 days as required by MCR 9.120(A); Count Two charged that respondent committed professional misconduct by answering in the negative a question on his 2003-2004 State Bar dues statement that asked whether he had been convicted of any misdemeanor or felony after the date he received a license to practice law in any jurisdiction, by failing to respond to that question on his 2004-2005 and 2005-2006 dues statements, and by knowingly making a false statement of material fact when he claimed that the plea was under advisement; Count Three (ultimately dismissed by the hearing panel) alleged that respondent engaged in a prohibited conflict of interest by representing Cheryl B and her husband despite their adverse interests; and Count 4 alleged that respondent committed professional misconduct in his behavior toward Cheryl B from February of 2002 and thereafter by patting Cheryl B on her buttocks in his office and by making sexually explicit remarks to her, including his comment that she should not worry about his legal fees because the balance could be paid on his "couch of restitution."

On July 24, 2006, subsequent to the institution of this public discipline proceeding, the Macomb County Circuit Court granted respondent's application to set aside his 2001 conviction for the misdemeanor offense of assault.

In his answer to the formal complaint, respondent admitted his 2001 conviction, and entered pleas of no contest to the allegations in Counts 1 and 2 that he had failed to provide the requisite notice of the conviction as required by MCR 9.120(A), that he falsely answered in the negative the question about convictions in his 2003-2004 dues statement, that he failed to respond to that same question in his 2004-2005 and 2005-2006 dues statements, and that he disclosed on February 7, 2006 that the plea was under advisement. However, respondent set forth as affirmative defenses that he had no criminal conviction because his 2001 conviction had been set aside on July 24, 2006, and that he had mistakenly believed his guilty plea had been taken under advisement.

In November of 2006, the Grievance Administrator filed a notice of intent to offer MRE 404(b) evidence consisting of the testimony of one Sandra B regarding "an additional act by Respondent of sexual assault of a female law client." The Administrator then filed a second notice of intent to offer MRE 404(b) evidence consisting of the testimony of Tina P of an additional act by Respondent of remarking to a vulnerable female client in a domestic matter that she could pay his fees on his "couch of restitution."

On January 19, 2007, the panel entered a written opinion, finding that with respect to the misdemeanor conviction matter (Case No. 06-76-JC), respondent had been convicted after his plea of guilty to assault and battery was accepted by Macomb County Circuit Court. With respect to Count One of the formal complaint (Case No. 06-77-GA), the panel found that respondent failed to provide written notice to the Grievance Administrator and the Board of his 2001 conviction as required by MCR 9.120(A), and that the setting aside of respondent's conviction did not preclude subsequent disciplinary proceedings against him. With respect to Count Two, the panel found that the trial transcript in respondent's criminal case clearly showed that the plea had not been taken under advisement, and that there was "absolutely no basis" upon which respondent could have formed such a belief, especially in light of his extensive legal experience.

The panel concluded that, as to Count One, respondent's failure to provide notification of his conviction constituted professional misconduct in violation of MCR 9.104(A)(1)-(4) and MRPC 8.4(a) and (c). It concluded that, as to Count Two, respondent's false response to a question concerning convictions on his 2003-2004 dues statement and his failure to respond to said question

on his 2004-2005 and 2005-2006 dues statements constituted professional misconduct in violation of MCR 9.104(A)(1)-(4) in that he failed to respond to a lawful demand for information from the Michigan Supreme Court in violation of MRPC 8.1(a)(2),[1] and that he knowingly made a false statement of a material fact in violation of MRPC 8.1(a)(1) by claiming that the plea was under advisement.

In a second opinion, also issued on January 19, 2007, the panel granted the Administrator's request to present the testimonies of Sandra B and Tina P pursuant to MRE 404(b), finding that such testimony was offered in order to establish the similarity of a scheme, plan, or system, and also went toward state of mind, intent, and opportunity. The panel concluded that such testimony would be relevant in light of defendant's denial of all of the allegations listed in Count 4 and would assist the panel in its assessment of the witnesses' credibility. Lastly, the panel specifically found that the probative value of such evidence would substantially outweigh any unfair prejudice to respondent.

At the February 8, 2007 hearing, the Administrator expressed his intent to call Cammie P, the victim in the 2001 criminal case that resulted in respondent's conviction for assault and battery. The panel ruled that, under MRE 404(b), she could testify on limited matters. Cammie P stated that she retained respondent in the year 2000 to assist her in getting an annulment from her then-husband. Cammie P described one meeting with respondent that occurred in his office. When Cammie P went to shake respondent's hand at the conclusion of the meeting, he unexpectedly squeezed her breast through her clothes and touched her groin area in a tickling fashion. Upon leaving respondent's office, she immediately called her sister-in-law, who advised her to notify the police. Cammie P also told her mother and former spouse about the incident. She later telephoned respondent and asked him why he had touched her, to which he had replied that he had thought she wanted him to. Cammie P asked respondent for a refund, which respondent provided.

Witness Wendi B testified that she is Cammie P's former sister-in-law and that Cammie P telephoned her after leaving respondent's office to report respondent's conduct to her. (This hearsay testimony was admitted by the panel under the excited utterance exception to MRE 803[2].)

Cheryl B testified at both the February 8, 2007 and July 26, 2007 hearings. She stated that in February-March 2002 her husband retained respondent in a criminal matter and she retained respondent in a termination of parental rights matter. She said she was satisfied with respondent's work on her behalf but that it was a very traumatic time for her. She stated that she and respondent

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[1] A typographical error in the written opinion listed this citation as MRPC 8.1(b)(2).

worked in the same building and that she went to respondent's office on almost a daily basis to discuss her case. At the conclusion of virtually every meeting, respondent tapped her on her buttocks as she departed the room. Cheryl B never protested this action by respondent and was not offended by it; instead, she characterized it as a practice common to older people.

Sometime around April 15, 2002, Cheryl B met with respondent around 4:00 P.M., after respondent's secretary had left. When she and respondent discussed her husband's sexual addiction class, respondent made a suggestive statement, then stood up, shut the blinds, pointed to his groin area and told her, in effect, to look at what she was doing to his "front porch." She testified that she became nervous, stood up, and asked how much she and her husband owed respondent. Respondent replied by telling her not to worry about his legal fees because she could pay the balance on his "couch of restitution." As soon as Cheryl B left respondent's office, she reported the incident to her supervisor, and together they reported it to the office manager. After this incident, respondent continued to represent her and her husband through June 2002, but never again touched her buttocks or made a sexual remark.

At the July 26, 2007 hearing before the panel, Cammie P's former husband testified that she had returned home crying after meeting with respondent. He listened in on a subsequent telephone conversation between her and respondent and heard respondent say that he had thought she wanted him to touch her. The witness also heard respondent offer to pay one of Cammie P's house payments for every time that she would have sex with him.

Next, Sandra B was called to testify pursuant to MRE 404(b). She testified that she retained respondent in 1993 regarding an overdue loan and a divorce matter. In her first meeting with him, she expressed concern about paying him. Respondent then closed the blinds, and requested oral sex for payment, which she agreed to do. After she received a bill from respondent, she filed a request for investigation against him, which she later tried to revoke and then reinstate, and then revoke again. She stated that her attempts to withdraw her request for investigation were at the behest of respondent.

At the September 18, 2007 hearing, Tina P testified that she retained respondent in a divorce matter first in 1998, and then again in 1999. During the 1999 action, respondent told her that payment of his fees could be made on the "couch of restitution," which she interpreted as meaning sexual acts.

After the Administrator rested, the panel granted respondent's motion to dismiss Count Three and two subparagraphs of Count 4, leaving intact the subparagraphs that alleged violations of MCR 9.104(A)(2) and (3).

Respondent's first witness, Patrick D, testified that he had been a co-worker of Cheryl B and that she never complained to him about any sexual improprieties committed by respondent.

Respondent's legal secretary testified at the September 18, 2007 and March 25, 2008 hearings that she had never seen respondent touch Cheryl B except for the times he patted her on her shoulder; nor did Cheryl B ever complain to her about respondent's behavior.

In his testimony to the panel, respondent denied all allegations made by Cheryl B, Cammie P, Sandra B, and Tina P that he had made sexually suggestive and inappropriate remarks to them and/or touched them in a sexual and inappropriate manner. Respondent said he had trouble collecting payment from Tina P and ended up garnishing her wages, which made her angry. Respondent explained that, at the urging of his attorney at the time, he offered a plea of guilty to the assault charge in 2001 even though he was innocent, because he feared that a jury would be unpredictable.

On April 11, 2008, the hearing panel entered its opinion on the charges of misconduct, finding that respondent's testimony was "considerably less than credible" and that the testimony of Cheryl B and the other witnesses presented by the Administrator was "most worthy of belief." The panel found respondent patted Cheryl B's buttocks on the many occasions she went to his office and that he made the sexually explicit remarks she described. The panel concluded that respondent's conduct constituted professional misconduct in violation of MCR 9.104(A)(2) and (3).

On June 10, 2008, a further hearing was held pursuant to MCR 9.115(J)(2) to determine the discipline to be imposed. Exhibits were admitted showing that respondent had two prior disciplinary offenses. The first one, in 1988, resulted in a suspension for thirty days, based on findings that he had failed to be completely candid with a client engaged in a conflict of interest, and failed to properly release client files. Respondent was also admonished in 1994 based on a finding that he improperly suggested an exchange of sexual acts for legal services while representing Sandra B.

In mitigation, respondent presented a number of witnesses, including attorneys, former clients and a retired judge, who all testified positively as to respondent's good character, professional skills, and good conduct. Respondent then offered his own testimony regarding his pro

bono legal work, extensive volunteer work, and decorated military service. In closing arguments, a number of aggravating and mitigating factors were advanced by the Administrator and respondent.

On July 21, 2008, the panel issued its order suspending respondent's license to practice law for a period of 120 days.

II. The Effect of the Entry of an Order to Set Aside Respondent's Conviction

Respondent's conviction in 2001 provides the basis for the disciplinary action commenced under MCR 9.120[2] as well as foundational evidence for the charges listed in Counts 1 and 2 of the formal complaint filed under MCR 9.115. Respondent argues that, although the Administrator and the Board could know about the expunged conviction, it could not be used in any manner in these

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[2] In its entirety, MCR 9.120 states:

(A) **Notification of the Grievance Administrator and the Attorney Discipline Board.** When a lawyer is convicted of a crime, the lawyer, the prosecutor or other authority who prosecuted the lawyer, and the defense attorney who represented the lawyer must notify the grievance administrator and the board of the conviction. This notice must be given in writing within 14 days after the conviction.

(B) **Suspension.**

(1) On conviction of a felony, an attorney is automatically suspended until the effective date of an order filed by a hearing panel under MCR 9.115(J). A conviction occurs upon the return of a verdict of guilty or upon the acceptance of a plea of guilty or nolo contendere. The board may, on the attorney's motion, set aside the automatic suspension when it appears consistent with the maintenance of the integrity and honor of the profession, the protection of the public, and the interests of justice. The board must set aside the automatic suspension if the felony conviction is vacated, reversed, or otherwise set aside for any reason by the trial court or an appellate court.

(2) In a disciplinary proceeding instituted against an attorney based on the attorney's conviction of a criminal offense, a certified copy of the judgment of conviction is conclusive proof of the commission of the criminal offense.

(3) The administrator may file with the board a judgment of conviction showing that an attorney has violated a criminal law of a state or of the United States. The board shall then order the attorney to show cause why a final order of discipline should not be entered, and the board shall refer the proceeding to a hearing panel for hearing. At the hearing, questions as to the validity of the conviction, alleged trial errors, and the availability of appellate remedies shall not be considered. After the hearing, the panel shall issue an order under MCR 9.115(J).

(C) **Pardon; Conviction Reversed.** On a pardon the board may, and on a reversal the board must, by order filed and served under MCR 9.118(E), vacate the suspension. The attorney's name must be returned to the roster of Michigan attorneys and counselors at law, but the administrator may nevertheless proceed against the respondent for misconduct which had led to the criminal charge.

disciplinary proceedings since the July 2006 court order expunging his 2001 conviction effectively wiped his record clean. In support of this argument, respondent cites MCL 780.622(1) which provides that, upon the entry of an order to set aside a conviction, "the applicant, for purposes of the law, shall be considered not to have been previously convicted," except as provided in MCL 780.622 and 780.623.

MCR 9.120 governs the effect of a criminal conviction in attorney disciplinary proceedings but does not address the effect of an order setting aside a conviction.[3] Therefore, we turn to other provisions for guidance on this issue.

The statutory provisions that govern the setting aside or expunction[4] of a conviction are set forth in MCL 780.621 et seq. Under MCL 780.621(1) and (2), a person convicted of not more than one offense may file an application with the convicting court for the entry of an order setting aside the conviction, as long as the conviction was not for an offense listed in MCL 780.621(2). "If the court determines that the circumstances and behavior of the applicant from the date of the applicant's conviction to the filing of the application warrant setting aside the conviction and that setting aside the conviction is consistent with the public welfare, the court may enter an order setting aside the conviction."[5]

The effect of an order setting aside a conviction is that the applicant is considered never to have been convicted: however, exceptions to this general rule are found in MCL 780.622 and 780.623.[6] Significantly, one those exceptions allows an agency of the judicial branch of state government to have access to the nonpublic record of the expunged conviction for purposes of "[c]onsideration in a licensing function."[7] Both the Attorney Grievance Commission and the

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[3] MCR 9.120(B)(1) refers to the vacation, reversal or setting aside of a conviction but only in the limited context of an automatic interim suspension upon conviction of a felony. MCR 9.120(C) directs that on a pardon the board may, and on a reversal the board must, vacate a discipline order based on a criminal conviction.

[4] A conviction that is set aside is also referred to as "expunged." People v. Van Heck, 252 Mich App 207, 209; 651 NW2d 174 (2002).

[5] MCL 780.621(9).

[6] MCL 780.622(1).

[7] MCL 780.623(2)(a).

Attorney Discipline Board are agencies of the Michigan Supreme Court with duties related to the supervision of licensed attorneys.[8]

The legislative history of House Bill 5229, dated January 7, 1983, provides an example of a proper use of the nonpublic record of an expunged conviction by an agency of the judicial branch in consideration of a licensing function. According to the Second Analysis of House Bill 5229, that bill would permit access to the nonpublic record "by the Board of Law Examiners so that that body may be fully aware of the background of applicants for admission to the bar."

The licensing functions supervised by the Supreme Court do not end after an attorney is admitted to the Bar. As stated in MCR 9.103(A), the license to practice law in Michigan is "a continuing proclamation by the Supreme Court that the holder is fit to be entrusted with professional and judicial matters and to aid in the administration of justice as an attorney and counselor and as an officer of the court." The Commission and the Board are charged with the responsibility to supervise and discipline lawyers who have been admitted to the bar and, like the Board of Law Examiners, it is entirely appropriate that they be allowed to consider a conviction that has been set aside.

We agree with the panel that it was proper for the Grievance Administrator to file a certified copy of the judgment of conviction and to refer to respondent's conviction in the formal complaint. Similarly, consideration of respondent's criminal conviction by a hearing panel appointed by the Board, an agency of the judicial branch of state government, was within the ambit of MCL 780.623(2)(a).

Moreover, this conclusion is in keeping with prior case law. In *People v Van Heck*, 252 Mich App 207; 651 NW2d 174 (2002), for example, the Court of Appeals compared the legal effect of a pardon in Connecticut vis-à-vis the legal effect of an expungement or setting aside of a conviction in Michigan, and found that the first removed the legal disabilities flowing from the conviction while the latter did not:

> "In contrast, an expungement under MCL 780.621 does not fully relieve an individual of the legal disabilities flowing from the conviction. For example, expungement pursuant to MCL 780.621 does not relieve a felony sex offender from the continuing duty to

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[8] The Commission is the prosecution arm of the Supreme Court for discharge of its constitutional responsibility to supervise and discipline Michigan attorneys. MCR 9.108(A). The Board is the adjudicative arm of the Supreme Court for discharge of its exclusive constitutional responsibility to supervise and discipline Michigan attorneys. MCR 9.110(A).

> register pursuant to the provisions of the Sex Offenders Registration Act, MCL 28.721 et seq. See MCL 780.622(3). More generally, the Department of State Police is required to retain a record of expunged convictions and their associated sentences, which may be accessed and used by a number of state authorities for a variety of reasons, including denial of employment or a professional license and enhancement of a sentence for a later felony conviction. MCL 780.623(2) (footnote omitted)." *Van Heck*, 252 Mich App at 215.

In finding that the setting aside of respondent's 2001 conviction did not relieve respondent of his obligation under MCR 9.120(A) to provide notification of the conviction, the panel stated:

> Attorneys have a continuing duty to conduct themselves at all times in conformity with standards imposed on members of [the] bar as a condition of the privilege to practice law. Included in that duty is the requirement that an attorney obey all the laws and refrain from engaging in illegal conduct. The obvious purpose of MCR 9.120(A) is to permit the administrator to promptly bring summary disciplinary proceedings against the convicted attorney, pursuant to MCR 9.120(B). The rule relies on the personal honesty and integrity of the offending attorney to own up to his conviction in a timely fashion and to accept the consequences of his misconduct. Respondent has totally failed to conform to that requirement. His conduct since his conviction has been one of evasion, duplicity and omission. He has consciously and knowingly avoided notifying the disciplinary authorities of his conviction. To now dismiss Count One would not only unfairly reward Respondent for his deceitfulness, but would frustrate the purpose and intent of MCR 9.120(A).

We agree with the panel's finding and conclusion on this point.

III. Whether Failure to Comply with MCR 9.120(A) Constituted Grounds for a Finding of Professional Misconduct?

Respondent argues that since MCR 9.104(A) does not specifically list a violation of MCR 9.120(A) as a ground for discipline, respondent's failure to notify the grievance administrator or the Board of his conviction as required by MCR 9.120(A) was not a valid ground for a finding of professional misconduct. We decide de novo the legal issues concerning construction of the rules of professional conduct. *Grievance Administrator v Fieger*, 476 Mich 231, 240; 719 NW2d 123 (2006).

Subchapter 9.100 governs the procedure to discipline attorneys[9] and is to be liberally construed.[10] MCR 9.104(A) lists the grounds for discipline in general. Although MCR 9.104(A) does not specifically cite MCR 9.120(A), it does list other misconduct that encompasses respondent's failure to provide notification of a conviction pursuant to MCR 9.120(A). For example, MCR 9.104(A)(1) states that "conduct prejudicial to the proper administration of justice" constitutes a ground for discipline.[11] We affirm the panel's conclusion that respondent's failure to provide notification was prejudicial to the proper administration of justice and constituted professional misconduct under MCR 9.104(A)(1) and (4).[12]

IV. Whether the Admission of Evidence Pursuant to MRE 404(b) was in Error?

Respondent contends that the hearing panel erred in admitting the testimony of Sandra B and Tina P pursuant to an exception to MRE 404(b)(1).[13]

Under MRE 404(b)(1), evidence of "prior bad acts" is generally not admissible to prove the character of a respondent in order to show action in conformity therewith. However, "prior bad acts" testimony may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case. For evidence of wrongful or criminal acts to be admissible under MRE 404(b), it must satisfy three requirements: (1) the evidence must

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[9] MCR 9.107(A).

[10] MCR 9.102(A)

[11] See also MCR 8.4(c). Misconduct includes "conduct that is prejudicial to the administration of justice."

[12] The hearing panel also found that respondent's conduct exposed the legal profession or the courts to obloquy, contempt, censure, or reproach, and was contrary to justice, ethics, honesty, or good morals. MCR 9.104(A)(2)-(3).

[13] Respondent also protests the admission of the testimonies of Cammie P, Wendi B, and Michael G on the same ground. However, Cammie P was presented to testify on the underlying facts of respondent's 2001 conviction, and the panel limited her testimony consistent with MRE 404(b). Wendi B's and Michael G's testimonies were presented to corroborate Cammie P. Therefore, their testimony did not constitute "prior bad acts" evidence under MRE 404(b).

be offered for a proper purpose, i.e., one other than to prove the defendant's character or propensity to commit the crime, (2) the evidence must be relevant to an issue or fact of consequence at trial, and (3) the evidence must be sufficiently probative to outweigh the danger of unfair prejudice pursuant to MRE 403. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended on other grounds 445 Mich 1205; 520 NW2d 338 (1994).

The panel found that the testimony of Sandra B and Tina P was offered in order to establish the similarity of a scheme, plan, or system, and went toward state of mind, intent, and opportunity. In this case, Sandra B testified that after she expressed concern on how she would pay respondent's legal fees for representing her in a divorce matter, respondent solicited oral sex from her in exchange for his legal services. Tina P testified that when she attempted to arrange a payment schedule for respondent's legal fees during her 1999 divorce action, respondent told her that payment could be made on the "couch of restitution." Cheryl B also testified to respondent's reference to a "couch of restitution" after she expressed concern about paying him for representing her and her husband.

The high degree of similarity of these separate accounts established respondent's system of making sexual overtures to female clients who were seeking legal assistance in a domestic matter. These overtures occurred during a discussion of his legal fees. Both Sandra B and Tina P testified that respondent used the phrase "couch of restitution," and closed the blinds before making sexual remarks to them. The panel did not err in finding a commonality in respondent's approach indicating a scheme, plan, or system and the panel did not err when it found that "prior bad acts" evidence was offered for a proper purpose under MRE 404(b)(1).

The second *VanderVliet* requirement is that the evidence be relevant. "Relevance is a relationship between the evidence and a material fact at issue that must be demonstrated by reasonable inferences that make a material fact at issue more probable or less probable than it would be without the evidence." *People v Crawford*, 458 Mich 376, 387-388; 582 NW2d 785 (1998). In *People v Sabin* (After Remand), 463 Mich 43, 63; 614 NW2d 888 (2000), the Supreme Court stated that "evidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system."

In this case, respondent categorically denied the allegations of sexual misconduct, thus making the credibility of the witnesses especially important. The "prior bad acts" evidence offered

in this case echoed Cheryl B's testimony to such a high degree that it was relevant to the issue of credibility.

Lastly, we agree with the panel that the danger of undue prejudice in admitting the "prior bad acts" testimony in this case did not substantially outweigh its probative value. The great degree of similarity between what Cheryl B described and what Sandra B and Tina P encountered in their interactions with respondent leads us to the conclusion that the probative value of the evidence was substantial and was not outweighed by the danger of unfair prejudice.

Accordingly, we conclude that the hearing panel did not abuse its discretion in admitting the challenged evidence.

V. Review of the Discipline Imposed

In accordance with the instructions handed down by the Supreme Court in *Grievance Administrator v Lopatin*, 462 Mich 235, 247-248 n 12; 612 NW2d 120 (2000), the hearing panel utilized the ABA Standards for Imposing Lawyer Sanctions ("Standards"). Because this case involved multiple acts of misconduct (misdemeanor conviction, failure to provide notification of conviction, failure to disclose conviction on dues statements, and sexual misconduct), the panel adhered to guidance provided in the Standards to impose a sanction that was at least consistent with, and generally greater than, the sanction for the most serious instance of misconduct.

In this case, the panel looked to Standard 7.2 which suggests that, absent aggravating or mitigating circumstances, suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed to the profession, and causes injury or potential injury to a client, the public, or the legal system. The panel properly considered aggravating factors which included prior disciplinary offenses, dishonest or selfish motive, a pattern of misconduct, multiple offenses, a refusal to acknowledge the wrongful nature of the conduct, vulnerability of the victim, and substantial experience in the practice of law. The panel found no significant mitigating factors and the panel ordered that respondent's license to practice law should be suspended for a period of 120 days.

As this case amply demonstrates, the ABA Standards do provide guidance to hearing panels by presenting an analytical framework but they do not, in and of themselves, relieve a hearing panel of what the Court has described as the "critical responsibility to carefully inquire into the specific facts of each case." *Grievance Administrator v Deutch*, 455 Mich 149; 565 NW2d 369 1997. First,

it is not always clear in cases involving multiple acts of misconduct to identify the conduct which should necessarily be considered the "most serious." Having found that respondent's failure to report his conviction and his failure to answer certain questions truthfully on his annual dues statement, the panel considered discipline under ABA Standard 7.2. However, as the Grievance Administrator argues, the panel could also have applied Standard 5.12 (failure to maintain personal integrity by knowingly engaging in criminal conduct that seriously adversely reflects on fitness to practice) as well as Standard 6.12 on the grounds that respondent's false statements concerning his alleged plea under advisement and his misleading statements on his dues form amounted to false documents submitted to a tribunal.

Nor do the Standards provide great assistance to a panel once, as in this case, application of one or more of the Standards suggests that a suspension, rather than reprimand or disbarment, is the appropriate sanction. In Michigan, the suspensions imposed by hearing panels and the Board under MCR 9.106 range from a minimum of 30 days to as long as five years. Within that range, a panel must consider not only any relevant opinions of the Supreme Court or the Attorney Discipline Board, but must weigh the aggravating and mitigating factors established by the evidence in light of the unique factual situations presented in that case. On review, the Board may then exercise a relatively high measure of discretion regarding the appropriate level of discipline in order to fulfill the Board's overview function of ensuring the continuity and consistency of discipline imposed. *Grievance Administrator v August*, 438 Mich 296, 304 (1991); *Grievance Administrator v Kevin R. Floyd*, 05-25-JC (ADB 2006).

In this case, the hearing panel ordered that respondent should be suspended from the practice of law for 120 days. We recognize that, as in most cases, this determination involved a number of subjective factors. There are, however, certain lines of demarcation between suspensions of varying lengths which must be considered by the Board on review. One of these is the line that separates suspensions of 179 days or less from suspensions of 180 days or more.

In the absence of specific conditions imposed in the discipline order, an attorney suspended for 179 days or less may generally be reinstated automatically when the suspension period has elapsed by simply filing an affidavit of compliance with the clerk of the Supreme Court, the Grievance Administrator and the Attorney Discipline Board, see MCR 9.123(A). By contrast, MCR 9.123(B) and MCR 9.124 require that an attorney suspended for a period of 180 days or more must undergo further scrutiny by a hearing panel in reinstatement proceedings which include the filing

of a petition for reinstatement accompanied by a detailed personal history affidavit covering the period of suspension; publication of a notice in the Michigan Bar Journal and on the Attorney Discipline Board's website[14] that the individual is seeking reinstatement; an investigation by the Grievance Administrator including a transcribed interview with the reinstatement petitioner and the filing of a written report; and the petitioner's personal appearance before a hearing panel to demonstrate by clear and convincing evidence that he or she can safely be recommended to the public, the courts and the legal profession as a person fit to engage in the practice of law.

It is the Board's determination that such further scrutiny is required in this case. The Board has previously held, in a case involving failure to provide information as required under the rules (failure to answer requests for investigation) coupled with prior discipline, that "constant transgressions of the spirit and letter of the court rules compel us to require some showing of fitness to reenter practice before being considered for reinstatement." *Grievance Administrator v Carl Ruebelman*, 36527-A (ADB 1980). The Board has also ruled that there are some types of misconduct which, by their nature, require suspension of sufficient length to trigger reinstatement proceedings under MCR 9.123(B) and MCR 9.124. These include not only deliberate misrepresentation to a client regarding the status of a case, *Matter of Ann Beisch*, DP 122/85 (ADB 1988) but also cases involving convictions for certain types of sexual conduct in which the respondent's moral character has been called into question. *Grievance Administrator v Peter E. O'Rourke*, 93-191-GA (ADB 1995) (Improper physical contact with a minor; discipline increased from reprimand to suspension of 180 days).

Taking into consideration the range of professional misconduct in this case, we conclude that protection of the public, the courts and the profession requires that respondent be suspended for a sufficient period of time to ensure that he is not permitted to resume his standing as a member of the profession unless he is able to establish his fitness by clear and convincing evidence. Discipline is therefore increased to a suspension of 180 days.

Board members William J. Danhof, Thomas G. Kienbaum, William L. Matthews, Andrea L. Solak, Rosalind E. Griffin, M.D., Carl E. Ver Beek, and Craig H. Lubben concur in this decision.

Board Members James M. Cameron, Jr. and Sylvia P. Whitmer, Ph.D. did not participate.

[14] www.adbmich.org