STATE OF MICHIGAN

Attorney Discipline Board

GRIEVANCE ADMINISTRATOR,
Attorney Grievance Commission,

Petitioner,

v Case No. 00-192-GA

CHE A. KAREGA, P 31387,

Respondent.
_____/

MEMORANDUM OPINION

Issued by the Attorney Discipline Board
211 W. Fort St., Ste. 1410, Detroit, MI

Tri-County Hearing Panel #76 issued an order in this matter on March 22, 2002 which ordered the suspension of the respondent's license to practice law in Michigan for a period of 150 days with the further condition that the respondent receive continuing legal education. The Grievance Administrator and the respondent petitioned for review and the Board conducted review proceedings in accordance with MCR 9.118.

On September 30, 2002, the Attorney Discipline Board entered its order affirming the hearing panel's order of suspension with conditions. The Board's order was accompanied by its opinion which included a discussion of the sufficiency of the evidence in support of the findings of misconduct; rejection of the respondent's argument that he was deprived of a fair hearing by the panel's denial of his request for an adjournment; and consideration of the Grievance Administrator's argument that the hearing panel erred and abused its discretion in imposing a suspension of less than 180 days.[1]

The Grievance Administrator filed an application for leave to appeal on October 21, 2002, On May 15, 2003, the Court returned this matter to the Board by an order which stated:

> On order of the Court, the application for leave to appeal the September 30, 2002 decision of the Attorney Discipline Board is considered, and pursuant to MCR 7.302(F)(1), in lieu of granting leave to appeal, we REMAND this case to the Attorney Discipline Board for reconsideration in light of Grievance Administrator v Lopatin, 462 Mich 235 (2000) and ABA Standards 2.3 and 9.22.

In accordance with the Court's order, the Board has reconsidered its order and opinion of September 30, 2002 as follows:

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[1] Grievance Administrator v Karega, ADB 00-192-GA (ADB 2002). The Board's opinion, including its discussion of the established misconduct, is available on the Board's website, www.adbmich.org.

I. Reconsideration in Light of Grievance Administrator v Lopatin

In its opinion of September 30, 2002, the Board specifically acknowledged the applicability of Grievance Administrator v Lopatin, 462 Mich 235 (2000) and the Supreme Court's mandate that hearing panels employ the American Bar Association's Standards for Imposing Lawyer Sanctions in determining the appropriate level of discipline once misconduct has been found. In that opinion we also specifically adopted the Grievance Administrator's analysis under the ABA Standards. We agreed with the Administrator's conclusion that the misconduct in this case is appropriately considered under ABA Standard 4.42. That Standard states:

> 4.42 Suspension is generally appropriate when:
> (a) lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client, or
> (b) a lawyer engages in a pattern of neglect and causes injury or potential injury to a client.

The first step in the analysis outlined in Lopatin is to determine the duty breached by the respondent. Second, the respondent's mental state must be determined. Third, the extent of harm or potential harm to the client must be ascertained.

In this case, respondent breached a duty to his client in that he neglected a client matter, and failed to communicate with his client. As to respondent's state of mind, we are in agreement with the Grievance Administrator's argument on review before the Board that while the evidence reveals that respondent knowingly failed to attend further hearings on his client's matter, the respondent's attempts to deflect blame from himself was motivated by his desire "to remove himself from direct responsibility for the negligent handling of his client's case." (Grievance Administrator's Brief 05/14/02, p 5.)

The respondent's client in this criminal matter was Latasha Morson. The individual who retained the respondent was Ms. Morson's mother, Peggy A. Bell. The Grievance Administrator argued,

> The harm suffered by Ms. Morson includes the delay caused by respondent's non-appearance at her hearing. While it is true that Ms. Morson's case did not suffer because of respondent's negligence, the same cannot be said in regard to Ms. Morson and her family's emotional well-being. The obvious emotional strain which resulted from respondent's failure to appear in court to assist Ms. Morrison, as she and her family had expected, was elicited through Ms. Bell's testimony. [Grievance Administrator's Brief 05/14/02, p 5.]

As we noted in our original opinion, the hearing panel gave a good deal of consideration to the aggravating effect of respondent's prior history of discipline for similar conduct involving lack of communication with clients. See ABA Standards 9.22(a) and 9.22(c). We also expressed our agreement with the Grievance Administrator's position that the respondent's substantial experience in the practice of law and the vulnerability of his client and her family could also have been taken into consideration. See ABA Standards 9.22(i) and 9.22(h).

We noted in our September 30, 2002 opinion that the question before the hearing panel and the Board in this case was not whether or not a suspension should be imposed but what the length of that suspension should be. Under MCR 9.106(2), the only specific limitations on a suspension in Michigan are that the suspension must be for a specified term and that it may not be less than 30 days. An order of suspension may impose additional conditions relevant to the established misconduct. If a suspension is for 179 days or less, it may be terminated by the filing of an affidavit. If the suspension is for a period 180 days or more, reinstatement proceedings under MCR 9.123(B) are required. MCR 9.106(2) does not impose a duty to enter an order of suspension of a specific minimum or maximum length for a particular type of misconduct. Similarly, the ABA Standards do not purport to impose mandatory minimum or maximum levels of discipline for any type of misconduct. As the Standards theoretical framework states:

> While there may be particular cases of lawyer misconduct that are not easily categorized, the Standards are not designed to propose a specific sanction for each of the myriad of fact patterns in cases of lawyer misconduct. Rather the Standards provide a theoretical framework to guide the courts in imposing sanctions. The ultimate sanction imposed will depend on the presence of any aggravating or mitigating factors in that particular situation. The Standards thus are not analogous to criminal determinate sentences, but are guidelines which give courts the flexibility to select the appropriate sanction in each particular case of lawyer misconduct. [ABA Standards, p 6.]

Upon careful reconsideration, we reaffirm our earlier conclusion that proper application of the American Bar Association's Standards for Imposing Lawyer Sanctions, as explicated in Grievance Administrator v Lopatin, supra, leads inescapably to the conclusion that a suspension is warranted in the case but that the Standards, in and of themselves, do not necessarily establish a specific length of suspension.

II. Reconsideration in Light of ABA Standard 2.3

ABA Standard 2.3 states:

> 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 and fitness to practice law. [Emphasis added.]

We have carefully reviewed the transcript of the proceedings before the hearing panel, the briefs submitted to the Attorney Discipline Board and the transcript of the review proceedings conducted by the Board in June 2002. We find no reference to ABA Standard 2.3 in the written or oral arguments presented to the panel or the Board by either party. Specifically, the Grievance

Administrator's counsel did not argue to the hearing panel or the Board, either directly or indirectly, that ABA Standard 2.3 overrides the minimum length of suspension under MCR 9.106(2) or that the panel's decision to impose a suspension of 150 days was in any way contrary to Standard 2.3.

The Attorney Discipline Board is troubled, therefore, by the manner in which the applicability of ABA Standard 2.3 was presented to the Court by the Grievance Administrator. The Administrator's brief frames the argument to the Court as whether or not the Attorney Discipline Board erred when it "deviated from Standard 2.3 of the ABA Standards for Imposing Lawyer Sanctions." The brief elaborates on this argument by explaining to the Court that:

> The central question in this case is whether or not the Board can ignore ABA Standard 2.3. [Grievance Administrator's Brief in Support of Application for Leave to Appeal, p 6, emphasis added.]

The Administrator continued in his brief:

> This Court adopted the ABA Standards in an effort to create a more consistent, predictable, and fair disciplinary system. For these same reasons this Court should require the Board to follow ABA Standard 2.3. It is the keystone to the ABA Standards. If the Board is free to ignore ABA Standard 2.3, as it has in this matter, then the disciplinary system post-Lopatin is bound to suffer many of the same feelings and criticisms as it did before that landmark decision. [Grievance Administrator's Brief, p 9, emphasis added.]

The Administrator's assertion to the Court that the Attorney Discipline Board "ignored" ABA Standard 2.3 in its deliberations in this case is misleading for two reasons. First, as noted above, the Grievance Administrator never raised an argument with regard to the applicability of ABA Standard 2.3 in proceedings before the hearing panel or the Board in this case.

Secondly, to the extent that the Grievance Administrator's brief implies that the Board has ignored ABA Standard 2.3, not only in this case, but in prior cases, such an implication is not accurate.

The issue of the applicability of ABA Standard 2.3 in Michigan discipline proceedings was argued to the Board by the Grievance Administrator in an earlier case, Grievance Administrator v Robert H. Golden, Case 96-269-GA (ADB 2001), lv den 465 Mich 1316 (2002). In our opinion in Golden issued September 18, 2001, we addressed the Grievance Administrator's argument that the Supreme Court's adoption of the ABA Standards constituted an instruction from the Court to the Attorney Discipline Board and hearing panels that suspensions in Michigan must generally be for a minimum period of six months and that automatic reinstatement should rarely, if ever, be allowed. We noted, among other things, that the notion of suspensions for a minimum period of six months as "generally" recommended in ABA Standard 2.3 would run counter to the express provisions of MCR 9.106(2). We concluded in Golden, by stating:

> 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. [Golden, supra, p 6.]

Inexplicably, there was no indication in the Administrator's application for leave or the supporting brief that the applicability of ABA Standard 2.3 had been addressed by the Board in a prior written opinion. The Board's opinion in Golden was known to the Grievance Administrator and was controlling authority on that issue. The Administrator had every right to seek a different result and to explain to the Court why his position was directly adverse to the Board's published opinion. Failure to disclose to the Court the Board's opinion in Golden as it related to Standard 2.3 was not appropriate, however.

We have not altered our view expressed in Golden, that ABA Standard 2.3 is a helpful guideline but that suspensions of less than 180 days may be appropriate in some cases. As noted below, the Grievance Administrator and the Attorney Grievance Commission apparently agree, as demonstrated by the Administrator's continued submission of consent discipline proposals which call for suspensions less than the six month period "generally" suggested in Standard 2.3.

Michigan Court Rule 9.106(2) expressly provides for suspensions as short as 30 days while MCR 9.123(A) expressly describes the procedure for automatic reinstatement in cases of suspensions of 179 days or less. Indeed, subsequent to the order of remand in this case, the Supreme Court published proposed Michigan Standards for Imposing Lawyer Sanctions. Those standards published for comment by the Court include proposed Michigan Standard 2.3 which replaces much of the language in ABA Standard 2.3 with the following:

> 2.3 Suspension
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> Suspension is the removal of a lawyer from the practice of law for not less than 30 days. See MCR 9.106(2). An attorney suspended for 180 days or more is not eligible for reinstatement until the attorney has petitioned for reinstatement under MCR 9.124, has established by clear and convincing evidence the elements of MCR 9.123(B), and has complied with other applicable provisions of MCR 9.123.[2]

Next, we have reviewed orders of suspension issued by hearing panels and the Attorney Discipline Board to determine whether lawyer suspensions in Michigan are, in fact, at odds with the suggestion in ABA Standard 2.3 that suspensions should "generally" be for terms greater than 180 days.

During calendar year 2003, for example, a total of 41 orders of suspension became effective. Of those, 25 imposed a suspension of 180 days or greater while 16 imposed a suspension of less than 180 days. Closer examination of those 16 orders of suspension for less than 180 days reveals that only 5 were issued by hearing panels following a sanction hearing. However, eleven of the 16 suspension orders under 180 days (68%) were issued as the result of

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[2]Although the Michigan Standards published for comment by the Court in July 2003 included many provisions suggested by former Attorney Grievance Commission Associate Counsel Donald D. Campbell, the Court did not publish for comment the Standard 2.3 proposed by Mr. Campbell under which all suspensions in Michigan would be for a term of no less than 180 days and until the lawyer had undergone the reinstatement process described in MCR 9.124.

a stipulation for consent order of discipline approved by the Attorney Grievance Commission and submitted to the panel by the Grievance Administrator.

Looking at the final orders of suspension in 2003 in a different way, 18 of the 41 suspension orders were the result of stipulations for consent under MCR 9.115(F)(5). Of those 18 consent orders for suspension, the Grievance Administrator stipulated to a suspension of 180 days or more in seven cases but stipulated to a suspension of less than 180 days in 11 cases (61%). By contrast, 23 suspension orders in 2003 were entered by hearing panels or the Board following a public hearing on discipline. In those cases, 18 orders imposed a suspension of 180 days or more. In only 5 (22%) of those cases did a panel impose a suspension of less than 180 days.

The statistics for the first nine months of 2004 are not significantly different. During that period, there have been 36 orders of suspension, 19 for periods of 180 days or more and 17 for terms of less than 180 days. Of the 17 suspension orders for less than 180 days, six were issued by a hearing panel after a public hearing on discipline while 11 (65%) were entered with the written consent of the Grievance Administrator and the Attorney Grievance Commission. Looking at the 15 consent suspension orders approved by the Administrator and the Attorney Grievance Commission during the period, 11 (73%) were for a suspension of less than 180 days. By contrast, hearing panels have entered 21 suspension orders in 2004 without a stipulation and in those cases, only six orders (29%) resulted in suspension for less than 180 days.

In short, it appears that suspension orders issued by hearing panels after a sanction hearing are, in fact, "generally" for a term equal to or greater than six months as suggested by ABA Standard 2.3. Consent orders approved by the Grievance Administrator and the Attorney Grievance Commission under MCR 9.115(F)(5), however, are substantially more likely to be for a period of less than six months. We do not question that the 22 consent orders for suspensions of less than six months from January 2003 through September 2004 represented appropriate sanctions under all the circumstances or that those suspensions for less than six months were properly approved by the Attorney Grievance Commission, the Grievance Administrator and a hearing panel. We do question, however, whether the decisions by a hearing panel and the Board to impose a suspension of 150 days in this case constitutes "an error of law requiring reversal."

As the Board said in its original opinion in this case,

> We are aware of no formula in the ABA Standards or clear precedent in Michigan case law which would point so directly to the need for a 180 day suspension in this case that the panel's decision could be fairly characterized as an abuse of discretion. [Grievance Administrator v Karega, 00-192-GA (ADB 2002), p 13.]

That observation was made with reference to the Grievance Administrator's arguments to the Board which did not include any reference to ABA Standard 2.3. However, given the Board's prior opinion in Grievance Administrator v Robert Golden, supra, that portion of our opinion in this case would likely have been the same.

III. Reconsideration in Light of ABA Standard 9.22

ABA Standard 9.22 lists the following factors which may be considered in aggravation.

(a) prior disciplinary offenses;
(b) dishonest or selfish motive;
(c) a pattern of misconduct;
(d) multiple offenses;
(e) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency;
(f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;
(g) refusal to acknowledge wrongful nature of conduct;
(h) vulnerability of victim;
(i) substantial experience in the practice of law;
(j) indifference to making restitution.
(k) illegal conduct, including that involving the use of controlled substances.

In our original opinion affirming the hearing panel's order of discipline, we wrote, with regard to the aggravating factors in this case:

> The Administrator acknowledges that the panel articulated the aggravating and mitigating factors which it considered. We are inclined to agree with the Grievance Administrator that the respondent's substantial experience in the practice of law [ABA Standard 9.22(i)] and the vulnerability of his client and her family [Standard 9.22(h)] could also have been taken into consideration. However, we are unable to adopt the Administrator's apparent underlying premise that any suspension less than 180 days is, perforce, an inadequate discipline or that the balancing of aggravating and mitigating factors is as simple as assigning a fixed mathematical value to each factor and then computing the pluses and minuses. [Grievance Administrator v Karega, 00-192-GA (ADB 2002) p 13.]

The aggravating factors noted with approval by the Board in this case included respondent's failure to respond to the Administrator's discovery request; respondent's failure to provide a key exhibit until the day of hearing; his failure to serve the entire panel with his pleadings; respondent's lack of respect for the circuit court and for his client by failing to advise of his intention to withdraw from the representation; his failure to attend scheduled appointments with his client's mother; his failure to understand the shortcomings of his conduct; and, finally, respondent's chronic history of failing to comply with the Michigan Rules of Professional Conduct as demonstrated by a history of discipline from 1986 to 1998 which included three suspensions (none requiring reinstatement), two reprimands and four confidential admonishments by the Attorney Grievance Commission.

As noted above, the Board further acknowledged in its original opinion that the panel could have considered the additional aggravating effect of the respondent's substantial experience in the practice of law [Standard 9.22(i)] and the vulnerability of his client and her family [Standard 9.22(h)]. It does not necessarily follow, however, that the hearing panel erred as a matter of law by not including them in its enumeration of aggravating factors. We accept the language in ABA Standard 9.22 at face value, that is, that Standard 9.22 lists factors which "may" be considered in aggravation, not factors which "must" be considered in every case. Of course, it should also be recognized that the list of factors which may be considered in aggravation under ABA Standard

9.22 does not purport to be an exhaustive list of all conceivable factors which could legitimately be included in the aggravation column. While it is not necessarily error for a hearing panel to conclude that an aggravating factor listed in Standard 9.22(a) should be afforded little or no weight under the circumstances of a particular case, neither would it necessarily be error for a panel to consider the aggravating effect of a fact or circumstance not specifically enumerated in Standard 9.22.

Furthermore, it must be recognized that all aggravating (or mitigating) factors are not created equal. First, there are some aggravating factors which will generally warrant greater consideration than others. Secondly, the same aggravating or mitigating factor may warrant different degrees of consideration, depending upon the facts and circumstances of a case. As an example of the first phenomenon, the aggravating effect of an attorneys "substantial experience in the practice of law" [Standard 9.22(i)] will generally be afforded less weight than the presence of prior disciplinary offenses [Standard 9.22(a)] or the attorney's pattern of misconduct [Standard 9.22(c)]. We note that the commentary to ABA Standard 9.22 cites a single case as an example of the aggravating effect of an attorney's substantial experience in the practice of law. In that 1980 case, Matter of John F. Buckley, 2 Mass. Atty. Dis. Rpt. 24 (1980), a justice of the Massachusetts Supreme Court accepted the recommendation of the Massachusetts Board of Bar Overseers to impose a public censure in the case of an attorney who had filed an inadequate brief in a criminal matter. In this two and one-half page opinion, the Court stated:

> The attorney argues that this is an isolated incident and that, in other matters, he has performed well. This is a two-edged argument because it acknowledges that the attorney has the experience and competence to do the job right. [Matter of Buckley, supra, at p 25.]

Interestingly, that opinion does not mention how long the attorney had been practicing law, how long he had been practicing criminal law in particular or the extent to which he could be said to have gained substantial experience in the practice of law. More germane to the point we are trying to make, the attorney's experience in the practice of law, although cited in the commentary to Standard 9.22 as an "aggravating factor," did not, in fact, contribute to an increase in discipline in that case. For the same reason that recognition of a respondent's experience in the practice of law in Buckley did not warrant increased discipline, the recognition of the respondent's experience in the practice of law as an aggravating factor in this case would not necessarily have produced a longer suspension.

As to the second point, we would simply note, for example, that a respondent's history of prior discipline [Standard 9.22(a)] may be afforded greater weight if those offenses were relatively recent and/or involved relatively serious offenses than a discipline history consisting of somewhat less serious offenses occurring much earlier in the respondent's legal career. Or, to take another example, the mitigating effect of certain factors identified in Standard 9.32 may be sufficient to warrant a decrease in the level of discipline in a case involving relatively minor misconduct while the same mitigating factors may not warrant consideration of discipline less than revocation in cases involving the "capital offenses" of law discipline, such as intentional theft of client funds held in trust or deliberate presentation of a forged document during a proceeding.

In our reconsideration in this case, we underscore our belief that while several aggravating factors under Standard 9.22 were properly identified by the panel, the factor warranting the greatest weight is this respondent's prior disciplinary offenses [Standard 9.22(a)]. In its report on discipline, the hearing panel said:

> The panel is also very concerned with Respondent Karega's prior discipline record. The three (3) prior suspensions, together with numerous reprimands and admonishments, disclose that Respondent Karega has a serious history of prior acts of misconduct. Many of the prior misconduct incidents also involve problems in client communications and adequate representation issues. [Hearing Panel Report, 03/22/02, p. 6.]

This Board shared that concern when it affirmed the hearing panel's decision to impose a suspension of 150 days and we share that concern now in the reconsideration ordered by the Supreme Court. We do not, however, conclude on reconsideration that our original decision was so clearly erroneous as to require modification now.

ATTORNEY DISCIPLINE BOARD

By: _____
Theodore J. St. Antoine, Chairperson

DATED: November 22, 2004

Board members Theodore J. St. Antoine, William P. Hampton, Marie E. Martell, Ronald L. Steffens, Rev. Ira Combs, Jr., George H. Lennon, Billy Ben Baumann, M.D., Lori M. Silsbury and Hon. Richard F. Suhrheinrich concur in this decision.

Board members was/were absent and did not participate.