STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner,

v

Frederick B. Gold, P-14086 ,

Respondent,

Case No. 99-35-GA

Decided: May 16, 2002

BOARD OPINION

Appearances: Frederick B. Gold, Respondent, *in propria persona*
Ruthann Stevens for the Grievance Administrator

I. Introduction

The Grievance Administrator and the Respondent timely petitioned for review of the decision of Tri-County Hearing Panel # 74 to suspend the respondent's license to practice law for six months. The formal complaint filed against the respondent stated three counts. The hearing panel dismissed the first count in the complaint, which charged the respondent with making improper sexual advances toward a client. The panel also dismissed the third count, which charged that the respondent made a deliberate misrepresentation in his answer to the request for investigation. However, the panel found that there was sufficient evidence to determine that the respondent made a false statement to a court, during his sentencing following a plea of *nolo contendere* to a charge of assault and battery.

The Grievance Administrator claimed that the panel erred in dismissing Counts I and III. The respondent asserts that there is insufficient evidence in the record to support the panel's findings of misconduct with respect to Count II. Respondent's motion for stay was granted, and the imposition of discipline was stayed pending the Board's review of this case.

The Attorney Discipline Board has conducted review proceedings, including review of the

record and due consideration of the briefs and arguments presented by the parties. For the reasons discussed more fully below, and in accordance with MCR 9.118(D), we affirm the decision of the hearing panel with respect to the finding that the respondent made a false representation to a court. The Board further holds that the panel's decision to dismiss Counts I and III is supported by the evidence in the record. Therefore, the hearing panel's findings that the respondent committed misconduct as charged in Count II of the formal complaint, and its dismissal of Counts I and III of the formal complaint, are affirmed.

The Board has determined, however, that a six month suspension of the respondent's license to practice law is not the appropriate level of discipline. The great weight of the aggravating factors, and the relative absence of mitigating factors, require the Board to increase the level of discipline. The respondent's license to practice law in Michigan will be suspended for the period of one year.

II. Procedural History

A formal complaint was filed against Respondent Frederick B. Gold on March 30, 1999. Count I of the complaint charged the respondent with violating: MCR 9.104(1)-(4) and the Michigan Rules of Professional Conduct ("MRPC") 1.7(b); 6.5(a); and 8.4(a)-(c). Count II charged the respondent with violating: MCR 9.104(1)-(4) and MRPC 3.3(a); 3.4(b) and (c); and 8.4(a)-(c). Count III charged that the respondent violated: MCR 9.104(1)-(4), (6), and (7); MCR 9.113(A); and MRPC 8.1(a) and 8.4(a)-(c).

III. Standard of Review

"The Board must determine whether the record... provides proper evidentiary support for the findings of the hearing panel. The Board does not conduct a de novo review of the factual findings; nor does the Board substitute its own judgment for the judgment and credibility determinations of the panel." Grievance Administrator v George T. Krupp, 96-287-GA (ADB 2002). Thus, the issue is not whether the Board believes the testimony of the respondent over that of the complainant. Instead, the Board must decide whether there is proper evidence in the record to support the panel's determination that the respondent made false and/or misleading statements to a tribunal.

IV. Discussion

A. Dismissal of Counts I and III

The hearing panel determined that the charges in Counts I and III of the amended formal complaint had not been established by a preponderance of the evidence. Count I essentially charged the respondent with engaging in inappropriate sexual behaviors with a client. Count III charged the respondent with making a false or misleading statement in response to a request for investigation.

The hearing panel weighed the evidence and found the testimony of both the complainant and the respondent to be credible. However, the hearing panel concluded that the Grievance Administrator had not established, by a preponderance of the evidence, that the respondent had committed the acts charged in Counts I and III.

With regard to Count I, the hearing panel determined that the complainant and the respondent both had motive to be truthful as well as a potential motive to be untruthful. The panel noted that the testimony of the complainant was in conflict with the testimony of the respondent. Given the controverted testimony, the hearing panel stated:

> It is impossible for this panel to resolve the conflicting evidence in a "he said, she said" situation without independent corroborating evidence. If [the complainant] had a ripped blouse, if she had gone to the police on that day or told her family on that day, the panel would feel more comfortable weighing the evidence in her favor. We do not conclude that [the respondent] told the truth and [that the complainant] lied. We also do not conclude that [the respondent] is more credible. Both sides presented legitimate testimony on this issue and therefore the Complainant, and the Grievance Administrator, have not established a case by a preponderance of the evidence. [Grievance Administrator v Frederick B. Gold, 99-35-GA (HP Report 12/14/00), p 4.]

The Grievance Administrator argued that the hearing panel demonstrated its bias against the complainant by its comments lamenting the lack of corroborating evidence, such as a ripped blouse. However, the panel's comments must be viewed in the context of the larger statement - that the conflict involved a "he said, she said" situation in which the panel was not able to make a determination that the testimony of one was more credible than the testimony of the other. It is clear that an allegation of sexual impropriety need not be accompanied by evidence of physical assault or harm to an accuser, or damage to his or her property, to be credible. A complainant who accuses his or her attorney of improper sexual behavior need not demonstrate that a police report was filed or that the improprieties were reported to family or friends, in order to be considered a credible complainant. In fact, the hearing panel stated, in its opinion, that, "[i]t is entirely conceivable that

in her frightened and desperate state of mind a person would allow a professional to physically, sexually act out, without running from the office or reporting it immediately." Grievance Administrator v Frederick B. Gold, 99-35-GA (HP Report 12/14/00), p 3.

In this case, the hearing panel merely held that there was insufficient corroborating evidence to find that either the respondent or the complainant was more credible than the other. The hearing panel's findings of fact and conclusion that the Grievance Administrator failed to establish misconduct by a preponderance of the evidence are supported by the record. While the Board may well have reached a different conclusion when presented with the facts of this case, we are constrained by the applicable standard of review[1]. "[I]t is not the Board's function to substitute its own judgment for that of the panels' or to offer a *de novo* analysis of the evidence." Grievance Administrator v Carrie L. P. Gray, 93- 250-GA (ADB 1996), lv den 453 Mich 1216 (1996). Thus, the hearing panel's decision to dismiss Count I will be affirmed.

Likewise, the hearing panel also dismissed Count III of the formal complaint, finding that the Grievance Administrator had failed to establish, by a preponderance of the evidence, that the respondent made a false statement in his answer to the request for investigation. The Grievance Administrator asserted that the respondent made a false statement when, in his answer to the request for investigation, he denied that he inappropriately touched the complainant. Since the hearing panel determined they could not conclude that the respondent committed the acts charged in Count I, the hearing panel also determined that the respondent did not make a false or misleading statement in denying that he committed those same acts. The decision of the hearing panel in dismissing Count I, and in derivatively dismissing Count III, is supported by the record and will be affirmed.

B. Count II - False and/or Misleading Statement to Tribunal

The Grievance Administrator charged that the respondent made a false and/or misleading statement to a tribunal. The respondent entered a plea of *nolo contendere* to two counts of assault and battery in Oakland County Circuit Court Case No.98-159172-FH. The assault and battery charges arose from the acts of physical contact which the complainant in this case alleged to have occurred. During his sentencing on October 21, 1998, on the assault and battery counts, the

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[1] The Board notes that the respondent's judgment of conviction on the assault and battery charges could have been filed with the Board pursuant to MCR 9.120. The respondent's no contest plea to the assault and battery charges would have constituted conclusive proof of misconduct and would have required the panel to enter an order of discipline for that criminal conduct. See MCR 9.104(5) and Grievance Administrator v Deutch, 455 Mich 149, 565 NW2d 369 (1997).

respondent advised Judge Stephen Andrews that he had not previously been suspended from the practice of law for similar conduct. In his answer to the amended formal complaint, the respondent denied that he made a false representation to the court, but did acknowledge that his license to practice law in Michigan had previously been suspended, by consent, for a period of three years.

The complainant in this case presented a statement at the onset of the sentencing hearing in Oakland County Circuit Court, related to the allegations contained in the criminal complaint. Her comments make clear that the assault and battery charges arose from her complaint that the defendant/respondent sexually assaulted her. The victim/complainant stated:

> I first consulted attorney Frederick Gold to represent me in a child support hearing February 9th of 1998. He used his position and my situation to molest me against my will. I have suffered severe emotional and financial loss due to his actions. Upon first reporting this incident to the police, excuse me, and Attorney Grievance [Commission], I discovered that other women had filed sexual assault complaints of equal or more severe molestation...My decision to go forward with this prosecution has not been an easy one, your Honor. When Mr. Gold sexually assaulted me, I was eight weeks into attending OCC, working towards the two year program as a licensed ultrasound technician. Immediately after the incident I sought counseling for anxiety and depression. I was overwhelmed and could not keep up studies. I had to postpone my college and lose my grant. [People of the State of Michigan v Frederick B. Gold, Case No. 98-159172-FH, Transcript of 10/21/98 Sentencing Hearing, pp 3-4.]

After the complainant finished her statement, the court inquired about previous charges and questioned the defendant/respondent attorney:

> Judge Andrews: Mr. Gold, is there anything you would like to say?
> Mr. Gold: No, your Honor.
> Judge Andrews: Probation, have there been other charges against this defendant?
> Probation Officer: Your Honor, our information was that in the early 1980s he was suspended for the practice of law for three years as a direct result of other allegations.
> Judge Andrews: Mr. Gold, isn't it true that you were suspended for three years for, by the Bar Association, for similar types offenses?
> Mr. Gold: **No, your Honor.**
> Judge Andrews: Is it true you were suspended from the Bar?
> Mr. Gold: I consented to a voluntary suspension, yes.
> Judge Andrews: And it stemmed from misconduct due to a sexual nature with your client? Is that true or false?
> Mr. Gold: It is not accurate as the Court stated it.
> Judge Andrews: All right. We're going to play a word game here.
> Mr. Gold: No, your Honor.
> [People of the State of Michigan v Frederick B. Gold, Case No. 98-159172-FH, Transcript of 10/21/98 Sentencing Hearing, p 7, emphasis added.]

The formal complaint filed 02/24/81 in the respondent's prior discipline case, Grievance Administrator v Frederick B. Gold, DP 18/81 (ADB 1981), enumerated six counts. The first count charged that the respondent took nude photographs of a female client, attempted to kiss the client, and placed his hand on her buttocks. The second count charged that the respondent made a knowing and willful misrepresentation in his answer to a request for investigation. The third count charged the respondent with attempting to pay the complainant $10,000 to withdraw her request for investigation and to encourage her to refuse to assist the Grievance Administrator in the prosecution of the complaint. The fifth count[2] in the complaint charged that the respondent asked inappropriate questions of a sexual nature while interviewing a female applicant for a secretarial position with his firm. The sixth count in the complaint charged the respondent with making sexual references, asking questions of a sexual nature, and kissing the hand of another female applicant for a secretarial position with his firm.

A stipulation for consent order of discipline was executed on 04/10/81. The stipulation stated, "Respondent Frederick B. Gold does hereby admit the charges of professional misconduct contained in the Formal Complaint herein, as follows: Respondent admits in full to Counts I, II, III, V and VI." Pursuant to the stipulated order, the respondent was suspended from the practice of law for a period of three years and one day. The suspension was effective 07/21/81. The respondent was reinstated to the practice of law effective 03/05/86.

On review, the respondent argues that the hearing panel's finding of misconduct is not supported by relevant evidence. The respondent claims that, at the time of sentencing, he did not recall the precise allegations which were contained in the 1981 discipline case. The respondent asserts that he did not make a false or misleading statement because, when questioned by the Court and by the panel, he simply responded "to the best of his recollection at the time."

The record in this case, including the transcripts of the panel hearings and the transcript of the criminal sentencing in Oakland County Circuit Court, provide sufficient evidentiary support for the hearing panel's determination that the respondent made a false or misleading statement to a tribunal. Therefore, the hearing panel's finding that the respondent committed misconduct as charged in Count II of the amended complaint will be affirmed.

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[2] The fourth count in the complaint was dismissed by stipulation of the parties.

C. Appropriate Level of Discipline

The hearing panel ordered that the respondent be suspended from the practice of law in Michigan for a period of six months. The panel also ordered that the respondent pay costs in the amount of $1,470.01. The Grievance Administrator argued that the misconduct in this case falls under ABA Standard for Imposing Lawyer Sanctions 6.12 which states:

> Suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.

The hearing panel recognized its obligation to use the ABA Standards for Imposing Lawyer Sanctions. Grievance Administrator v Lopatin, 462 Mich 235 (2000). In determining the level of discipline to be imposed, the Board looks not only to the ABA Standards but may also consider Michigan disciplinary case law precedent. GA v. Lopatin, 92-224-GA (ADB 2001), lv den ___ Mich ___ (2002), p 8. The panel agreed with the Grievance Administrator and concluded that suspension was the appropriate level of discipline to be imposed. However, the panel disagreed with the Grievance Administrator's argument that three years was an appropriate length of suspension. Rather, the panel concluded that six months was the appropriate length of time for which the respondent's license to practice law should be suspended.

The panel noted that the respondent had previously been disciplined, but that the discipline was remote in time, having occurred approximately eighteen years prior to the filing of this complaint. The panel was clear in its report that it was important for the respondent to be subjected to the reinstatement process in stating, "[w]here, as in this case, an attorney has breached the fundamental obligation to be truthful in his or her dealing with a court, further scrutiny of the type afforded in the reinstatement process would appear to be called for." GA v Frederick B. Gold, 99-35-GA (HP Report 10/16/01), p 5.

The Grievance Administrator argues that a six month suspension is not an adequate level of discipline in this case. The Grievance Administrator assets that the hearing panel failed to afford sufficient weight to the aggravating factors presented in this case. We find the Grievance Administrator's arguments to be persuasive. Specifically, the misconduct in this case is aggravated by the respondent's prior disciplinary offense. Although the prior misconduct is remote in time, it remains significant in light of the similarity of the charges in the two complaints. ABA Standard 9.22(a). The respondent was licensed to practice law in Michigan in 1964; his substantial experience in the practice of law may also be considered as an aggravating factor. ABA Standard 9.22(i). The respondent's false or misleading statement to the court, occurring during his own sentencing on criminal charges, evidences a dishonest or selfish motive. ABA Standard 9.22(b). Finally, the complainant in this case, who was distraught over the possible loss of custody of her five year old

child, may be considered a vulnerable victim. ABA Standard 9.22(h). Conversely, the Board's review of the mitigating factors enumerated in ABA Standard 9.32 reveals that only the remoteness of the respondent's prior offense, ABA Standard 9.32(m), serves to mitigate the discipline in this case.

After careful review of the record in this case, and application of the ABA Standards, including aggravating and mitigating factors, the Board concludes that a suspension of 180 days duration is not appropriate. The Board therefore increases the level of discipline in this case, and will order that the respondent's license to practice law in Michigan be suspended for a period of one year.

V. Conclusion

There is sufficient evidentiary support in the whole record to support the hearing panel's finding that the Grievance Administrator failed to establish, by a preponderance of the evidence, that the respondent committed the misconduct charged in Counts I and III of the amended formal complaint. The record also clearly supports the panel's finding that the respondent committed the misconduct charged in Count II of the complaint, specifically that the respondent made a false or misleading statement to a tribunal. Thus, the panel's findings of fact will be affirmed.

The sole mitigating factor present in this case is the remoteness in time of the respondent's prior discipline. Conversely, the Board finds that several aggravating factors, including the prior discipline for behavior similar to that charged in this complaint, the respondent's substantial experience in the practice of law, the evidence of a dishonest or selfish motive, and the vulnerability of the victim-complainant in this case cumulatively warrant the imposition of discipline greater than a 180 day suspension. Consequently, the respondent's license to practice law in Michigan will be suspended for a period of 1 year.

Board Members Wallace D. Riley, Theodore J. St. Antoine, Ronald L. Steffens, and William P. Hampton concur.

Board Members Nancy A. Wonch, Marie E. Martell, and Rev. Ira Combs, Jr. concur in the decision to affirm the finding of misconduct, but would have increased discipline to a suspension of three years, requiring recertification.

Board Members Marsha M. Madigan, M.D. and George Lennon did not participate.