STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellee,

v

Andrew L. Shirvell, P 70472,

Respondent/Appellant,

Case No. 15-49-GA

Decided: May 8, 2018

Appearances:

Cynthia C. Bullington, for the Grievance Administrator, Petitioner/Appellee
Andrew L. Shirvell, Respondent/Appellant, In Pro Per

BOARD OPINION

Tri-County Hearing Panel #11 of the Attorney Discipline Board issued an order of disbarment in this matter on March 30, 2017. Respondent petitions for review, seeking either a remand or a decrease in the discipline imposed. The Attorney Discipline Board has conducted review proceedings in accordance with MCR 9.118. For the following reasons, the Board finds that the panel did not err in imposing an order of disbarment, and, therefore, the decision is affirmed.

I. Background

This case has an extensive background, which is best summarized in the Sixth Circuit's opinion in *Armstrong v Shirvell*, unpublished opinion of the Sixth Circuit Court of Appeals, issued February 2, 2015 (Docket No 13-2368):

> In 2010, Christopher Armstrong was elected president of the student council at the University of Michigan in Ann Arbor. The student council does not make University policy, but it works with, reports to, and advises the University on a range of issues.

Andrew Shirvell, a 2002 graduate of the University, worked as an Assistant Attorney General for the State of Michigan. In early 2010, Shirvell learned via an online newspaper report of Armstrong's election and also learned that Armstrong was openly gay. Shirvell began posting on his Facebook page about Armstrong, whom he had never met. Among other comments, Shirvell called Armstrong "dangerous" and a "radical homosexual activist" and a "major-league fanatic who is obsessed with imposing the radical homosexual agenda on the student body." Shirvell also set up a Facebook "fan page," entitled "Michigan Alumni and Others Against Chris Armstrong's Radical MSA Agenda," which purported to "expos[e] the real Chris Armstrong." He urged others, via Facebook and email, to join the "pro-family" group in order to "fight[] against Satan's representative." Shirvell took to his personal Facebook page to express outrage when Facebook deleted his "fan page" about Armstrong. He wrote: "I will not be SILENCED by the likes of Armstrong. You're going down fruity-pebbles." His self-proclaimed "outrage" continued from there: "I better not see Chris Armstrong at MY [church] parish in Charlotte that's all I got to say." He claimed that Armstrong was scared of him and - in commenting on another story involving gay students - "remember[ed] the good old days when 'guys' like this would get their asses kicked at school."

Not content with Facebook posting, Shirvell then established a blog entitled "Chris Armstrong Watch," which discussed Armstrong's "character and his agenda and other items." The blog purported to be a "watch site," providing "testimony" and "an expose of the REAL Chris Armstrong." The blog was accessible to the public from April 2010 until September 30, 2010, when Shirvell removed it from public view. The blog featured a picture of Armstrong's face next to a swastika. It called Armstrong "a radical homosexual activist, racist, elitist, & liar." It attributed to Armstrong a "Nazi-like hatred of the First Amendment," explaining, "Much like Nazi Germany's leaders, many of whom were also homosexuals, Armstrong believes that any and all opposition must be suppressed by whatever means necessary." The blog further stated that Armstrong "mocks Christians," and called Armstrong an "anti-Christian bigot[]." One entry claimed that Armstrong attended an event "whose intent was to encourage underage drinking," and that Armstrong "spent most of this time [after the semester ended] engaging in underage binge-drinking." The blog made repeated references to Armstrong's participation in - and facilitation of - underage drinking. It alleged that Armstrong showed contempt toward law enforcement. Shirvell - re-posting online conversations between Armstrong and another student at the University - claimed that these conversations revealed Armstrong's

"tendency toward sexual promiscuity," and thus labeled Armstrong "a perverted homosexual exhibitionist." Shirvell interpreted another online conversation as demonstrating that Armstrong had previously hosted an "orgy" in his college dormitory, at which "homosexual shenanigans" were rampant. Days after this entry, Shirvell authored another blog post proclaiming: "Armstrong engages in sexual escapades at 'churches & children's playgrounds.'" He linked Armstrong to "possible involvement" in violent attacks against places of worship in the wake of California's passage of Proposition 8. He alleged that Armstrong used his welcome to freshmen as "a thinly veiled attempt to cause sexually confused, and perhaps some impressionable, 17-and-18-year-olds to experiment sexually with members of their own gender."

Shirvell also reported on an alleged romantic relationship between Armstrong and another student. Shirvell claimed that the other student was "not out of the closet," but that Armstrong "basically seduced" the student and quickly became obsessed with him. Explaining that the other student, "[t]hanks in large part to Armstrong's influence . . . has indeed morphed into a proponent of the radical homosexual agenda," Shirvell called Armstrong "a very, very twisted sick individual who is manipulative and cunning in a most devilish way."

Shirvell also appeared on television to rant about Armstrong. In September 2010, in an interview on local station WXYZ, he said that Armstrong held the presidential position in order "to promote special rights for homosexuals at the cost of . . . heterosexual students." Shirvell later appeared in front of a national audience with CNN's Anderson Cooper. Standing by his blog and Facebook posts, Shirvell told Cooper that he had "gotten stuff from third-party sources," and argued that Armstrong was not giving interviews because "he can't defend what's on the blog." When Cooper suggested that Shirvell was a bigot, Shirvell retorted, "The real bigot here is Chris Armstrong." Two days later, back before a national audience on Comedy Central's The Daily Show, Shirvell said that Chris was "acting like a gay Nazi," and that this explained his decision to include a picture of Armstrong next to a swastika on the blog.

Across these various forums, Shirvell attempted to justify his commentary by pointing to several purportedly legitimate concerns. Shirvell, a proud Roman Catholic, apparently feared that Armstrong would discriminate against Christian, pro-life, and pro-family people. In one post, Shirvell warned that these groups would be "violently persecuted." Second, he claimed that "Armstrong's radical agenda

includes mandating 'gender-neutral' housing" at the University, an initiative that Shirvell opposed. Third, he believed that Armstrong would use his platform as president to "promote the homosexual lifestyle." Finally, Shirvell opposed Armstrong's membership in a student group known as the Order of the Angell, an organization that - according to Shirvell - was known as "the University of Michigan's version of the KKK," and had "a well-documented history of racism and elitism." Shirvell claimed that Armstrong lied before the election about his intentions to join the group.

In addition to broadcasting his views, Shirvell tracked Armstrong down in Ann Arbor. At first, Shirvell posted flyers around campus and in students' mailboxes. He soon discovered Armstrong's off-campus residence and made an appearance at a party there. On several occasions, he marched up and down the street outside Armstrong's house, protesting. Fearing for his safety and that of his roommates when they needed to leave their home, Armstrong called the campus Department of Public Safety and received an escort. Shirvell later followed Armstrong to two campus events in the space of a day, holding a sign that branded Armstrong a racist liar and advertised the Chris Armstrong Watch blog. On one occasion, Shirvell stood outside Armstrong's residence while Armstrong was hosting a party, called police to complain about the noise, then filmed the ensuing proceedings and posted about the party on his blog. On one occasion, while Armstrong was speaking at a rally, Shirvell heckled him and took pictures of him. After discovering online that Armstrong planned to attend a friend's birthday party, Shirvell went, uninvited, to the party. Armstrong and his friends became concerned.

Shirvell approached students outside of an Ann Arbor night club on one occasion - while holding a sign saying "Chris Armstrong is a racist liar," and quizzed them about their online conversations. Shirvell told one student that he planned to go to her house the following day because he had heard she was hosting a party. The friend, afraid that Shirvell might endanger her guests, decided to cancel the party. Another time, Shirvell learned that Armstrong's friends were celebrating a birthday at a bar. He showed up at the bar, then followed the group to another bar around a mile away. When confronted, he lied about his identity, then asked for Armstrong. Shirvell believed Armstrong was supposed to be with the group, and produced a printed Facebook invitation to prove it.

Shirvell continued to monitor Armstrong's activities even while Armstrong was off campus. In the summer of 2010, Shirvell learned that Armstrong was working as an intern in Washington, D.C., in the

office of then-Speaker Nancy Pelosi. In a blog post entitled "Pelosi's Office Reconsiders Armstrong's Internship; Currently Investigating His Ties to Racist Student Group," Shirvell explained that he personally contacted a Pelosi aide, provided him with documents about Armstrong's membership in the Order of the Angell, and was assured that the aide would investigate further. In several phone calls and messages to Pelosi's office, Shirvell accused Armstrong of being a racist and of having lied to minority students' faces.

University authorities were concerned about Shirvell's actions. Beginning in June 2010, University police reports detail Shirvell's ongoing harassment of Armstrong. Ann Arbor police also became involved. In July 2010, police asked Shirvell to stop contacting Armstrong, but Shirvell continued, undeterred. In the fall of 2010, the University police issued Shirvell a trespass warning, banning Shirvell from the University campus. The warning was later modified, allowing Shirvell onto campus, but still requiring him to avoid contact with Armstrong. The police were familiar with peaceful protests on campus but believed Shirvell's conduct was different. The Deputy Chief of the University police testified that the warning was necessary because Shirvell was "obsessed with" Armstrong, and was perceived as a threat to him. Despite this, the prosecutor's office declined to issue a criminal warrant against Shirvell. The Deputy Chief believed that Shirvell's sole reason for focusing on Armstrong was "that he was against him being gay." Even at the time of trial - after Armstrong had graduated and the trespass warning had expired - the Deputy Chief remained concerned about Armstrong's safety.

In April 2011, Armstrong sued Shirvell in Michigan state court for defamation, intentional infliction of emotional distress, abuse of process, false light, intrusion, and stalking. Shirvell removed the case to federal court. Armstrong later dismissed the abuse of process claim and the court granted summary judgment on the intrusion claim. The court denied Shirvell's motion for summary judgment on the remaining claims. Armstrong requested that Shirvell retract certain statements, but Shirvell refused.

A jury trial occurred in August 2012. Shirvell moved for judgment as a matter of law at the close of Armstrong's evidence and renewed the motion at the close of all evidence. The court took the motions under advisement. The jury found Shirvell liable on all counts. On the defamation claim, the jury found that Shirvell made some of his defamatory statements negligently and made others with actual malice. The jury marked on the verdict form the statements that were

> made with actual malice and the ones that were made with negligence and also indicated that eleven specific statements constituted defamation per se. The jury awarded $4.5 million in total damages.[1]

In 2013, Shirvell brought suit against Deborah Gordon, who was Armstrong's attorney in the civil suit against Shirvell.[2] The district court dismissed the action and imposed non-monetary sanctions against Shirvell under Rule 11 of the Federal Rules of Civil Procedure.[3] Shirvell appealed, and the Sixth Circuit affirmed the district court's ruling. In addition, the Sixth Circuit determined that Shirvell's appeal was frivolous, although it declined to impose further sanctions. See *Shirvell v Gordon*, unpublished opinion of the Sixth Circuit Court of Appeals, issued February 2, 2015 (Docket No 13-2366).

The Grievance Administrator filed a Formal Complaint alleging in three separate counts that respondent committed professional misconduct. Specifically, Count One alleged respondent harassed and stalked Armstrong; Count Two alleged respondent engaged in frivolous litigation; and

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[1] Shirvell appealed the jury verdict to the Sixth Circuit Court of Appeals. Although the Court found that "[m]ost of Shirvell's objections lack merit," it determined that the district court committed plain error in its treatment of the compensatory damages for false light. As a result, the Sixth Circuit reduced the judgment to $3.5 million.

[2] The lawsuit alleged tortious interference with a business relationship, defamation, and false light invasion of privacy. Basically, Shirvell alleged Gordon interfered with the AG's investigation into Shirvell's conduct by influencing the investigator, and thus was responsible for his discharge from the AG's office.

[3] Rule 11 states, in pertinent part:

> (b) Representations to the Court. By presenting to the court . . . a pleading, written motion, or other paper, an attorney . . . is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, ---
>
> > (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
> >
> > (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
> >
> > (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery[.]

Count Three alleged a conflict of interest based upon respondent's employment as an Assistant Attorney General. The hearing panel determined that petitioner had established the misconduct charged in Counts One and Two,[4] but found that the Grievance Administrator failed to prove respondent violated MRPC 1.7(b)(2) [conflict of interest], as alleged in Count Three.

At the hearing on discipline, the panel heard testimony from Deborah Gordon, respondent, and Mark Drinkall, who is a personal friend of respondent. Counsel for the Grievance Administrator argued that disbarment is the appropriate discipline for respondent's conduct, while respondent asked for discipline ranging from a reprimand to a suspension of 179 days or less. After considering the appropriate American Bar Association (ABA) Standards for Imposing Lawyer Sanctions, as well as aggravating and mitigating factors, the panel ordered disbarment.

Respondent petitioned the Attorney Discipline Board for review of the hearing panel's order, raising six issues, arguing that: (1) the disciplinary proceedings were fatally compromised where all three panel members failed to disclose alleged biases against respondent; (2) respondent was not given fair notice that his questioning of Deborah Gordon during her deposition would subject him to a finding of misconduct; (3) the hearing panel abused its discretion by admitting into evidence the Sixth Circuit Court of Appeals' opinion in *Armstrong v Shirvell*, *supra*; (4) the hearing panel abused its discretion in failing to admit three of respondent's exhibits; (5) the panel's findings of misconduct are not supported by the record; and (6) the discipline imposed does not fit the misconduct established in this matter.

II. Hearing Panel Rulings

In reviewing a hearing panel decision, the Board must determine whether the panel's findings of fact have "proper evidentiary support on the whole record." *Grievance Administrator v August*,

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[4] It was alleged in Counts One and Two that respondent: filed frivolous litigation in the United States District Court and the Sixth Circuit Court of Appeals, in violation of MRPC 3.1; failed to treat all persons involved in the legal process with courtesy and respect and did so because of a protected personal characteristic, in violation of MRPC 6.5; engaged in conduct that is a violation of the Michigan Rules of Professional Conduct, in violation of MRPC 8.4(a) and MCR 9.104(4); engaged in conduct involving dishonesty, fraud, deceit, misrepresentation or violation of the criminal law, where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer, in violation of MRPC 8.4(b); engaged in conduct that is prejudicial to the administration of justice, in violation of MRPC 8.4(c) and MCR 9.104(1); engaged in conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach, in violation of MCR 9.104(2); and engaged on conduct that is contrary to justice, in violation of MCR 9.104(3).

438 Mich 296, 304 (1991). See also *Grievance Administrator v T. Patrick Freydl*, 96-193-GA (ADB 1998). "This standard is akin to the clearly erroneous standard [appellate courts] use in reviewing a trial court's findings of fact in civil proceedings." *Grievance Administrator v Lopatin*, 462 Mich 248 n 12 (2000) (citing MCR 2.613(C)). Under the clearly erroneous standard, a reviewing court cannot reverse if the trial court's view of the evidence is plausible. *Thames v Thames*, 191 Mich App 299, 301-302 (1991), lv den 439 Mich 897 (1991). Additionally, although the Board reviews the record very closely and carefully, it does not "re-sift the evidence and weigh it anew." *Grievance Administrator v Wilson A. Copeland*, 09-48-GA (ADB 2011).

A. Asserted Grounds for Disqualification of Panel Members

Respondent's first argument on review is that his disciplinary proceedings were "fatally compromised by the undisclosed biases and myriad grounds for disqualification" concerning all three panel members. First, respondent asserts Margaret A. Costello had a duty to disclose the following: (1) that she had been a candidate for judge of the 3rd Circuit Court of Wayne County during the August 8, 2000 primary election, and had been publicly endorsed by "Pride PAC," an LGBT political action committee; (2) that she gave an interview with Crain's Detroit Business in 2006, in which she is quoted as saying that she has no children "by conscious choice. I'm just not into children;" (3) that she contributed a small amount of money to the attorney general campaign of Democrat Amos Williams, the reelection campaign of then-Governor Jennifer Granholm, a Democrat, in 2006, and the Grosse Pointe Democratic Club, from 2004-2013; (4) that she is a political supporter of Steve Tobocman, who served as the Democratic Majority Floor Leader in the Michigan House of Representatives from 2007-2008; and (5) that she signed, along with 1,423 other law school faculty members, a January 9, 2017 letter addressed to the ranking minority member of the United States Senate Committee on the Judiciary, urging the Senate Committee's rejection of then-Republican Senator Jeff Sessions' nomination for the position of Attorney General of the United States.

With respect to panel member Anthea E. Papista, respondent asserts Ms. Papista should have disclosed the following: (1) she is the editor of the Michigan Family Law Journal and that in the August/September 2016 publication, Ms. Papista chose to include an article entitled, "After Obergefell: Recurring Legal Obstacles Related to Intimate Partner Violence," written by an alleged homosexual activist; (2) she is a member of the State Bar of Michigan's Family Law Section Council, which has a committee called "Alternative Family" that supposedly encourages all Council

members to join a new section of the State Bar called "the Lesbian, Gay, Bisexual, Transgender, Questioning, and Allies [LGBTQA]" section; (3) she has donated money to the Family Law Section PAC since 2013; (4) in 2012, she contributed money to the committee to re-elect Judge Richard Halloran, who is the current chair of the Family Law Section Council and the chair-elect of the LGBTQA section, as well as to the attorney general campaign of Democrat Amos Williams and various campaign committees of then-Governor Jennifer Granholm, from 2003-2008.

Finally, respondent argues panel chairperson Lamont E. Buffington should have disclosed that in the fall of 1972 - eight years before respondent was even born - Mr. Buffington was a candidate for the position of Freshman Member-at-Large on the University of Michigan Law School Student Senate. Respondent argues that all three panelists had a duty to disclose the above information, and that their failure to do so "irrevocably prejudiced [r]espondent and fatally undermined the legitimacy of the underlying disciplinary proceedings."

Respondent's argument is misplaced and otherwise without merit. Respondent is claiming persecution for his beliefs and political views and is focusing on what he presumes are the beliefs and political views of the three hearing panelists; however, this case is not about beliefs, it is about respondent's behavior. There is no evidence respondent was disciplined by the hearing panel because of his beliefs; rather, the evidence supports the conclusion that it was respondent's behavior that warranted a finding of misconduct.

B. Evidentiary Support for Panel Findings

With regard to Count One, there is overwhelming support for the panel's finding of misconduct. Respondent's blog was a public forum and contained vicious, unfounded attacks against Armstrong personally. This was not merely disagreeing with Armstrong's views - this was a "smear" campaign against Armstrong, where it seemed respondent had no boundaries. For example, the home page of the blog featured Armstrong's face next to a swastika; respondent referred to Armstrong as "the privileged pervert;" he referred to Armstrong as a "gay Nazi" on national television; he accused Armstrong of hosting an orgy at his University of Michigan dorm; he accused Armstrong of being sexually promiscuous and engaging in lewd activities in churches and children's playgrounds - all allegations that had absolutely no factual support. The civil jury concluded that, in total, 100 statements made by respondent were defamatory - and more than 60 of those were made with actual malice. Respondent also repeatedly followed Armstrong to various

public establishments and private parties, including Armstrong's personal residence. Even when Armstrong was working in Washington D.C., respondent contacted Armstrong's employer. Respondent's rhetoric was not political as asserted; it was hostile and vindictive, and a personal attack on Armstrong.

Likewise, with regard to Count Two, misconduct is also clear. In the complaint against Deborah Gordon, respondent alleged Gordon interfered with the internal investigation the Attorney General's office conducted regarding respondent's actions, and as a result, he was discharged from the AG's office. Respondent made these allegations recklessly without any support or concern for the truth. In fact, prior to filing the lawsuit, respondent knew the AG special investigator had already testified that he had never communicated with Gordon prior to the completion of his investigation. As determined by the district court and affirmed by the Sixth Circuit Court of Appeals, respondent's claims were based entirely on speculation. For these reasons, there was also sufficient evidence introduced to support the panel's finding of misconduct in Count Two.

In reaching this decision, the Board has not considered respondent's alleged inappropriate questioning of Ms. Gordon at her deposition. The Board finds that there was sufficient evidence outside of Ms. Gordon's questioning to warrant a finding of misconduct. As such, we need not and will not discuss this issue any further on review.

C. Admissibility of the Sixth Circuit Opinions

Respondent next claims the hearing panel erred in admitting and relying on the Sixth Circuit Court of Appeals' unpublished opinions in *Armstrong v Shirvell*, 596 Fed Appx 433 (CA 6, 2015) and *Shirvell v Gordon*, 602 Fed Appx 601 (CA 6, 2015), as well as the Michigan Court of Appeals Opinion in *Shirvell v Dep't of AG*, 308 Mich App 702 (2015). A trial court's decision to admit evidence is discretionary and will not be disturbed "absent a clear abuse of discretion." *People v Aldrich*, 246 Mich App 101, 113; 631 NW 2d 67 (2001). "An abuse of discretion occurs when the [trial] court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008).

Respondent argues that the court opinions should not have been admitted because the cases do not involve a criminal conviction or sanctions against respondent. However, in *Grievance Administrator v Geoffrey N. Fieger*, 97-83-GA (ADB 1999), this Board determined that MCL 600.2106 applies to disciplinary proceedings. The Board held that, since the prior factual findings

of the court are not conclusive, the parties to a disciplinary proceeding are entitled to supplement the record with any other relevant evidence they wish to present. Even if respondent cannot rebut the presumption, he may still argue that the facts recited by the court orders do not amount to misconduct. The Board concluded that the statute "plays no role in determining whether the facts establish a violation of the Rules of Professional Conduct." See also *Grievance Administrator v Gregory J. Reed*, 10-140-GA (ADB 2014) (citing *Grievance Administrator v Mark L. Silverman*, 11-3-GA (HP Order 4/13/11), in which the panel applied the statute to a Sixth Circuit Court of Appeals' opinion and federal court order).

In accordance with *Fieger, supra*, the panel properly admitted and considered the court records offered into evidence by the Grievance Administrator in accordance with MCL 600.2106. The Sixth Circuit's opinion created a rebuttable presumption as to its factual findings; respondent was not only entitled to supplement the record with testimony and other relevant evidence, he was entitled to argue to the panel that the facts recited in that opinion do not amount to misconduct. Respondent availed himself of that opportunity to present evidence and to argue that his actions did not constitute professional misconduct under the rules cited in the complaint. Accordingly, the hearing panel did not abuse its discretion in admitting into evidence the opinions of the Sixth Circuit Court of Appeals and Michigan Court of Appeals.

Furthermore, the hearing panel could have taken judicial notice of the opinions pursuant to MRE 201. See *In re Stowe*, 162 Mich App 27 (1987) (Pursuant to MRE 201, a court may take judicial notice of facts which are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned). The facts stated in an appellate opinion possess a general assurance of accuracy and reliability. In writing appellate opinions, it can be assumed the courts makes every effort to ensure the statement of facts in its opinions completely and accurately reflects the record. Accordingly, it would have been proper for the panel and it is proper for this Board, in evaluating respondent's conduct, to take appropriate judicial notice of both the pertinent facts stated in the appellate opinions and of the judgment in *Armstrong v Shirvell, supra.*

D. Panel Rulings Regarding Exhibits Proffered by Respondent

During the misconduct hearing, respondent sought to admit three exhibits: an "alert" found by respondent when doing a Google news search for Mr. Armstrong's name, an article indicating Mr. Armstrong had been criticized by Democrats on campus, and the denial of request for prosecution

from the Washtenaw County Prosecutor's Office, denying the request to bring charges against respondent for harassment or stalking.

The Michigan Rules of Evidence apply in attorney discipline proceedings. See MCR 9.115(A); MCR 9.115(I)(1). See also *Grievance Administrator v Frederick A. Patmon*, 93-47-GA; 94-157-GA (ADB 1997). Generally, all relevant evidence is admissible. Relevant evidence is evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401.

The hearing panel properly excluded these three exhibits because they are clearly irrelevant to a determination of whether respondent committed professional misconduct. Respondent argued the Google alert and news article are relevant to show "that there were a lot of people that were concerned about the election, people that had nothing to do with Mr. Shirvell at the time that he created and started his blog." (Tr 4/26/16, pp 26-28.) At issue here is Andrew Shirvell's conduct, not the conduct of Chris Armstrong or anyone else. The fact that others were reacting to Armstrong or even shared the same beliefs as respondent is completely irrelevant. Those individuals are not attorneys before the Attorney Discipline Board who have been charged with misconduct.

Respondent argued the document from the Washtenaw County Prosecutor's Office is relevant because it shows that he was never charged criminally, even though the jury found respondent had engaged in stalking. The exhibit, however, merely shows that no criminal charges were brought against respondent - an issue that is not disputed by either party. In fact, at the misconduct hearing, counsel for the Grievance Administrator stipulated that no criminal charges were brought. (Tr 4/26/16, p 102.) As acknowledged by respondent's counsel at the hearing, the burden of proof for criminal stalking is much different than it is for civil stalking. (Tr 4/26/16, p 101.) As a result, the panel did not abuse its discretion in excluding the evidence based on relevancy.

III. Level of Discipline.

In accordance with the holding of *Grievance Administrator v Lopatin*, 462 Mich 235 (2000), the Board and its hearing panels follow the American Bar Association (ABA) Standards for Imposing Lawyer Sanctions in determining the appropriate level of discipline to impose when misconduct has been established. In applying the Standards, panels start by examining the factors set forth in ABA Standard 3.0 - the duty violated, the lawyer's mental state, and the injury caused -

to help select applicable standards recommending generally appropriate discipline. Counsel for the Grievance Administrator argued, and the panel agreed, that disbarment is appropriate under Standards 6.11 [False Statements, Fraud and Misrepresentation] and 7.1 [Violations of Duties Owed as a Professional]. In addition, although not specifically cited by the Grievance Administrator, the panel found Standard 5.11 [Failure to Maintain Personal Integrity] equally applicable.

ABA Standard 5.11 provides for disbarment when "a lawyer engages in . . . intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice." Here, false and misleading statements made publicly about Armstrong fit such intentional conduct, as does the frivolous complaint filed by respondent against attorney Deborah Gordon.

ABA Standard 6.11 provides that "[d]isbarment is generally appropriate when a lawyer, with the intent to deceive the court, makes a false statement, submits a false document, or improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding." Likewise, ABA Standard 7.1 provides for disbarment when "a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system." Respondent did all of these things when he engaged in frivolous litigation.

Respondent argues on review that the panel ignored or gave insufficient weight to his mitigation. However, ABA Standard 9.32 lists factors which "may" be considered in mitigation, not factors which "must" be considered in every case. Furthermore, the ABA Standards do not dictate precisely what weight should be given to aggravating or mitigating factors. See *Grievance Administrator v Che A. Karega*, 00-192-GA (ADB Memorandum Opinion 2004) (recognizing that not all aggravating or mitigating factors are created equal). While it is the Board's responsibility to ensure consistency and continuity in discipline imposed by panels and the Board, sometimes it is required "to independently determine the appropriate weight to be assigned to various aggravating and mitigating factors depending on the nature of the violation and other circumstances considered in similar cases." *Grievance Administrator v Karen K. Plants*, 11-27-AI; 11-55-JC (ADB 2012) (citing *Grievance Administrator v Saunders V. Dorsey*, 02-118-AI; 02-121-JC (ADB 2005)).

The hearing panel in this case carefully weighed and analyzed the aggravating and mitigating

factors:

> Having determined that disbarment is presumptively appropriate, the panel considered whether any relevant aggravating or mitigating factors exist. ABA Standard 9.1 states that, after misconduct is established, "aggravating and mitigating circumstances may be considered in deciding what sanction to impose.["]
>
> With respect to aggravating factors, the panel finds that a dishonest or selfish motive was present, as set forth in ABA Standard 9.22(b). Although respondent may have been driven by his zealous beliefs rather than a motive for personal gain, his motive toward Mr. Armstrong was to discredit him because of his sexual orientation, and to use false statements and other harassing actions to do so. Respondent's excuse that his false and malicious statements were "rhetorical hyperbole" not likely to hurt someone, is untenable. (Tr 12/12/16, pp 103,145). It is inconceivable that respondent did not know that his false and "provocative" speech would harm Mr. Armstrong. Thus, the aggravating factor of a dishonest or selfish motive, rather than simply careless or negligent behavior, is satisfied. Moreover, his motive in filing frivolous litigation against Ms. Gordon was, at least in part, retaliatory, further satisfying the aggravating factor of a dishonest or selfish motive.
>
> Another aggravating factor applicable here is ABA Standard 9.22(j), indifference to making restitution. Respondent has a large civil judgment against him, as a result of his actions set forth in Count One. Respondent acknowledged this judgment, and further acknowledged that he has taken no steps to attempt to satisfy even a small part of the judgment. Although it is noted that respondent apparently has had no income until recently - and even now his income is minimal - he could have at least made a gesture to begin making small payments. Respondent has simply ignored the judgment.
>
> With respect to the mitigating factors that respondent has asked the panel to consider, the panel finds that none are sufficient to warrant a departure from disbarment. It is acknowledged that respondent has no prior disciplinary record (ABA Standard 9.32(a)); however, he was licensed to practice law for only approximately three years before the misconduct occurred. Given this fact, minimal weight is given to respondent's lack of a disciplinary record.
>
> Although Pastor Mark Drinkall testified as to respondent's reputation for truthfulness and honesty, Mr. Drinkall admittedly is a friend of respondent. Moreover, respondent's character and trustworthiness

> toward his friends, and those who share his beliefs, are not at issue. Of concern are respondent's *actions* toward those who do not share his beliefs. Thus, there was insufficient evidence of good character and reputation (ABA Standard 9.32(g)) presented to warrant its consideration as a mitigating factor. [Sanction Report, pp 3-4 (emphasis added).]

Here, the hearing panel concluded that the mitigating factors are outweighed by the aggravating factors, and respondent has not persuaded us the panel erred in doing so. The panel's assessment of the weight to be given to those factors, as well as its unanimous decision to order disbarment, was likely based in part upon the panel members' first hand opportunity to observe and weigh the testimony of the witnesses and to draw conclusions based upon their demeanor, attitude and presence. Nevertheless, even if the hearing panel had given considerable weight to Mr. Drinkall's testimony as a mitigating factor, it would not warrant a decrease in discipline. The fact that respondent has a close friend who speaks highly of him is an insufficient reason for departing from the recommended sanction of disbarment under three separate ABA Standards.

Because there have been no similar instances of misconduct addressed by Michigan courts or the attorney discipline system, it is helpful to examine discipline imposed in other jurisdictions. Here, by looking at cases where an attorney is involved in conduct amounting to the intentional infliction of emotional distress, defamation and stalking/harassment, we found some guidance.

A. Intentional Infliction of Emotional Distress (IIED)

In Michigan, the definition of IIED provides that "[one] who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm." See *Hall v Citizens Ins Co*, 141 Mich App 676, 684 (1985). The California State Bar Court has drawn a connection between extreme and outrageous conduct in the IIED context and conduct warranting disbarment. See *In re Torres*, 96-O-04035 (Cal Bar Ct, 2000). *Torres* is a disciplinary case involving an attorney who engaged in an extended pattern of harassment against a client, including making over one hundred telephone calls to the client's house. In considering the appropriate discipline for the lawyer's misconduct, the court relied heavily on the fact that the client had successfully sued the lawyer on an intentional infliction of emotional distress theory for the same conduct. Ultimately, the court ordered disbarment, and concluded that what made the conduct

intolerable was the fact that it was committed by a lawyer.

B. Defamation

Defamation is loosely defined as the act of harming the reputation of another by making a statement to a third person.[5] In *Atty Griev Comm'n v Frost*, 85 A3d 264, 266 (2014), a Maryland attorney knowingly made false statements impugning the integrity and qualifications of two judges, a state's attorney, and the Maryland Attorney General. The court determined such conduct demonstrated a lack of fitness to practice law and requires disbarment.

C. Stalking/Harassment

In *In re Keaton*, 29 NE3d 103, 104 (2015), the Indiana Supreme Court addressed the conduct of a married attorney who began an affair with his daughter's college roommate. After the roommate ended their relationship, the attorney sent her thousands of "threatening, abusive, and highly manipulative" emails and voice mails over the course of several years; he also sent explicit photos of her to family, friends, and others. In addition, the attorney maintained a blog that named the roommate and included "disparaging diatribes . . . and explicit photographs of her." The attorney also appeared unannounced at the roommate's home and at the library of the law school she was attending. The Indiana Supreme Court held that the attorney's stalking, harassment, and intimidation adversely reflected on his fitness to practice law. Considering that conduct, along with false statements made to the disciplinary commission, the court ordered disbarment.

Likewise, in *State ex rel. Counsel for Discipline v Janousek*, 267 Neb 328, 329; 674 NW2d 464 (2004), the Nebraska Supreme Court addressed the conduct of an attorney over a three-month period toward a former romantic partner, whom he also had represented during their relationship. After the attorney denied owing a debt to the victim and used racial slurs against her, she obtained a protective order, which he violated by "pounding and yelling" outside her home for forty-five minutes. The attorney then sent a series of four threatening and degrading letters to the victim. In addition, the attorney filed a groundless legal claim against the victim, and he threatened that he

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[5] In Michigan, the elements of a defamation claim are: "(1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication." *Mitan v Campbell*, 474 Mich 21, 24; 706 NW2d 420 (2005).

could shoot her through her window as she slept at night. The Court concluded that disbarment was appropriate.

In *State ex rel. Okla. Bar Ass'n v Shanbour*, 84 P3d 107, 108 (2003), an attorney became obsessed with a former secretary. He repeatedly mailed cards and postcards containing obscene pictures and offensive language to the secretary and to others acquainted with her, including the minor child of her boyfriend. He was ultimately convicted of stalking and distribution of obscene materials. The court concluded that the attorney's offenses were so egregious that he had to be disbarred.

D. Filing Frivolous Lawsuits

In *In re Jafree*, 444 NE2d 143 (Ill 1982), the Administrator of the Illinois Attorney Registration and Disciplinary Commission filed a three-count complaint charging the respondent attorney with professional misconduct. The complaint alleged that respondent instituted numerous defamatory and frivolous lawsuits, appeals, and administrative actions. The Hearing Board recommended that he be disbarred, and the Review Board adopted that recommendation. See also, *In re Tymiak*, 343 NW2d 291 (Minn 1984) (disbarring attorney for knowing advancement of unwarranted claims and filing of suits to harass others, failure to comply with court orders, expenditure of money from client's trust fund for personal use, making false or scandalous statements in the course of litigation, and engaging in representation resulting in conflicts of interest).[6]

Disbarment is well within the realm of discipline that could have been imposed by the hearing panel. The panel's conclusions are supported by the record and by an appropriate application of the American Bar Association Standards for Imposing Lawyer Sanctions. Respondent filed a completely unfounded and frivolous lawsuit, without any consideration for the harm and expense it would cause the defendant or the waste of the court's resources. Likewise, respondent publicly made unfounded, offensive, defamatory statements about Armstrong with absolutely no consideration for the harm it would cause. In doing so, respondent demonstrated an egregious failure

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[6] In Michigan, the Board has imposed suspensions of one year and three years in two different cases involving a gross loss of perspective leading to egregious violations of the rules of professional conduct. See *Grievance Administrator v David H. Raaflaub*, 01-94-GA (ADB 2003) and *Grievance Administrator v William Ortman*, 93-135-GA (ADB 1995). However, these cases were not accompanied by respondent's other conduct, such as stalking and public vilification.

of professional judgment and character. Such conduct demands discipline for the protection of the public. Therefore, the hearing panel's order of disbarment is affirmed.

Board members Louann Van Der Wiele, Barbara Williams Forney, James A. Fink, Jonathan E. Lauderbach, Karen O'Donoghue, and Michael B. Rizik, Jr., concur in this decision.

Board members Rev. Michael Murray, John W. Inhulsen, and Linda M. Hotchkiss, M.D. were absent and did not participate.