STATE OF MICHIGAN

Attorney Discipline Board

GRIEVANCE ADMINISTRATOR,
Attorney Grievance Commission,

Petitioner,

v Case No. 16-55-GA

OTIS M. UNDERWOOD, P 21678,

Respondent.
_____/

ORDER AFFIRMING HEARING PANEL ORDER OF SUSPENSION

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

Tri-County Hearing Panel #71 of the Attorney Discipline Board issued an order on August 7, 2017, suspending respondent's license to practice law in Michigan for a period of 179 days. The Grievance Administrator filed a petition for review arguing that the hearing panel imposed insufficient discipline and requesting that the Board increase the discipline imposed to a one-year suspension of respondent's license, or to at least a 180-day suspension requiring reinstatement under the provisions of MCR 9.123(B) and 9.124.[1] Respondent's 179-day suspension became effective August 29, 2017.

The Attorney Discipline Board has conducted review proceedings in accordance with MCR 9.118, including review of the evidentiary record before the panel and consideration of the briefs and arguments presented by the parties at a review hearing conducted on October 18, 2017.

The complex set of facts involved in the underlying matter that eventually formed the basis for these disciplinary proceedings initiated against respondent, were aptly summarized by the hearing panel:

> [This was] an attorney-client dispute which originated with a Workers' Compensation check for $33,460.08 issued over 15 years ago, arising out of claims by William Coleman against his employer, Foamade Industries, Inc. The initial injury giving rise to the claims herein occurred in 1991, over 25 years ago. (Petitioner's Exhibit 2.)
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> Not only were there protracted proceedings prior to the issuance of the check for $33,460.08 on December 11, 2000, but subsequent disputes over the attorney fee and cost reimbursement entitlements of respondent involved multiple litigations and proceedings in the Oakland County Circuit Court, hearings in the Workers' Compensation Agency, appeals to the Michigan Court of Appeals,

[1] Before the hearing panel, the Grievance Administrator argued that respondent be disbarred.

> rulings by the Board of Magistrates of the Workers' Compensation Agency, opinions issued in the Michigan Court of Appeals, and an Application for Leave to Appeal to the Michigan Supreme Court.
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> The underlying matter also involved enforcement actions in Oakland County Circuit Court, including the issuance of an Order to Seize obtained and issued on behalf of respondent and against Mr. Coleman in the amount of $19,273.70 on July 28, 2014, 14 years after the payment of $33,460.08. The Order to Seize was premised upon a judgment in the sum of $19,273.70 obtained by respondent on November 15, 2005, and included interest of $6,924.10 for a total of $26,197.80 alleged to be due on July 28, 2014.
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> The Order to Seize was vacated in the Oakland County Circuit Court on October 22, 2014, and Judge Michael Warren ruled that the Order to Seize was erroneously issued.
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> As set forth herein, at various times in these multiple litigations, involving a variety of forums, respondent was subject to sanctions, determination of vexatious filings, punitive damages, and adverse attorney fee awards. [Report 3/30/17, p 7.]

Ultimately, the hearing panel found that respondent violated MRPC 3.1; 3.3(d); 8.4(a) and (c), and MCR 9.104(1)-(4). The panel further found that respondent did *not* violate MRPC 1.15(b)(3) and (c); 3.3(a)(2); and 8.4(b), as charged in the formal complaint. The Administrator does not challenge the panel's findings of misconduct or its findings that certain charges were not established.

With regard to the discipline imposed by the hearing panel, the Administrator submits that the panel failed to heed a "second directive" set forth in *Grievance Administrator v Lopatin*, 462 Mich 235; 612 NW2d 120 (2000),[2] to ensure consistency in discipline for certain offenses, as the Board "generally imposes a one-year suspension" for "false statements such as respondent's." Precedent of this Board and of the Court shows that discipline imposed for "false statements" varies depending on a variety of factors including the type of statement made and to whom, the respondent's mental state and/or motivation, whether other misconduct was found and the nature

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[2] In *Lopatin*, the Supreme Court directed the Board and hearing panels to employ the ABA Standards for Imposing Lawyer Sanctions in determining the appropriate level of discipline. The Court summarized the Standards' theoretical framework for deciding the level of discipline to be imposed after a finding of misconduct. The inquiry begins with three questions:

1. What ethical duty did the lawyer violate? (A duty to a client, the public, the legal system or the profession?)
2. What was the lawyer's mental state? (Did the lawyer act intentionally, knowingly, or negligently?)
3. What was the extent of the actual or potential injury caused by the lawyer's conduct? (Was there a serious or potentially serious injury?) *Lopatin*, 462 Mich at 239-240 (quoting ABA Standards, p 5).

Next, the hearing panel examines recommended sanctions based on the answers to these questions. *Lopatin*, 462 Mich at 240; ABA Sanctions, pp 3, 4-5. Then, aggravating and mitigating factors are considered. *Id.*

of that misconduct, and, more importantly, whether the respondent was found to have engaged in conduct involving dishonesty, fraud or deceit, in violation of MRPC 8.4(b).

Here, the hearing panel specifically found that the amount in controversy was not the product of fraud or embezzlement and they specifically did not find a violation of MRPC 8.4(b). (Report 3/30/17, p 21 fn11; Report 8/7/17, p 7.) Again, the Administrator does not seek review of the panel's decision in this regard. Reviewing the facts of the underlying protracted proceedings as well as the careful and considered rationale provided by the panel, the cases cited by the Administrator to support the request for a one-year suspension and/or a suspension requiring reinstatement proceedings, appear distinguishable.[3]

Again citing to *Lopatin*, and acknowledging that "no two cases are identical," the Administrator maintains that the Court's directive in *Lopatin* requires a hearing panel to "sanction similar misconduct similarly." We agree that *Lopatin* and the adoption of the Standards was intended to foster consistency in discipline so that seemingly identical cases would not receive vastly different levels of discipline. However, as we have noted, *Lopatin* and the Standards do require the Board and its panels to consider meaningful distinctions between instances of lawyer conduct and gauge and adjust discipline appropriately based on such distinctions.

> The levels of discipline set out in the ABA Standards are not absolute but are described in the preface to the Standards as recommended sanctions which are generally appropriate, absent aggravating or mitigating circumstances. Moreover, the Supreme Court has cautioned the Board and hearing panels that the directive to follow the ABA Standards should not be viewed as an instruction to abdicate the responsibility to exercise independent judgment. *Lopatin*, 462 Mich at 248 n 13. [*Grievance Administrator v James R. Phillips,* 11-62-JC (ADB 2012).]

In this matter, the hearing panel recognized that there were unique facts and circumstances to consider, and that they were charged with reviewing a situation rightly characterized by respondent and his counsel a number of times throughout the proceedings as the "attorney discipline version of Moby Dick." (Tr 5/9/17, pp 24, 39; Respondent's brief, p 1.) The panel noted the risks involved in such a situation:

> A party has the right to aggressive advocacy, to and through the highest appellate courts, of all good faith arguments. A party who is an attorney and self-represents has no less a right to aggressive advocacy in our system of justice. Notwithstanding, when an attorney litigates on an in pro per basis, especially over a period of many, many years there is a particular risk of loss of professional

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[3] The Grievance Administrator cites to *Grievance Administrator v Russell Slade*, 150-89 (ADB 1991) (intent to deceive the court by failing to disclose the death of his client to gain tactical advantage); *Grievance Administrator v Noel Lippman*, 04-120-GA (ADB 2007) (false statements to a tribunal, knowing and intentional misrepresentation in answer to request for investigation, competency, and neglect, in violation of MRPC 8.4(b)); *Grievance Administrator v Mark Canady*, 489 Mich 865 (2011) (intentionally lying and presenting manufactured documents to court to avoid probation violation in a criminal matter); *Grievance Administrator v Keith Mitan*, 06-74-GA (ADB 2008) (violating orders of a tribunal and providing dishonest testimony, in violation of MRPC 8.4(b)); *Grievance Administrator v Frederick Gold*, 99-35-GA (ADB 2002) (lying to court about prior disciplinary history, in violation of MRPC 8.4(b)).

> independence and the sound objective and independent judgment which should be present at every step of the way in the litigation process. [Report 3/30/17, p17.]

This Board has not been inclined to "simplistically characterize conduct by labels (e.g. 'assault') and then allow that characterization to dictate the level of discipline to be imposed irrespective of actual distinctions." *Grievance Administrator v Lisa Londer*, 07-127-JC (ADB 2008). See also *Grievance Administrator v Wade H. McCree,* 14-59-GA (ADB 2017), p 10. "Different circumstances can lead to adjustments in discipline," *Grievance Administrator v Alexander Melnikov,* 15-144-JC; 15-145-GA (ADB 2017), citing *Londer*, supra, and in the absence of a finding of dishonest conduct, we and the panel considered carefully whether, under all of the circumstances here, it was essential for the respondent in this case to undergo reinstatement proceedings pursuant to MCR 9.123(B) and MCR 9.124.

The panel's sanction report references and analyzes each component of the theoretical framework set forth in the ABA Standards. Additionally, the panel clearly explained why they determined that the suspension level standards found in ABA Standards 6.12 and 6.22 were the applicable Standards to impose, and, finally, they carefully analyzed and weighed all of the aggravating and mitigating factors the parties argued were applicable. Both reports issued by the hearing panel are well reasoned with regard to a difficult set of facts, determination of whether misconduct occurred, and with regard to the panel's rationale for the discipline ultimately imposed.

Upon careful consideration of the whole record, the Board is not persuaded that the hearing panel's decision to order a 179-day suspension was inappropriate.

NOW THEREFORE,

IT IS ORDERED that the hearing panel's order of suspension issued August 7, 2017, is **AFFIRMED**.

ATTORNEY DISCIPLINE BOARD

By: _____
Louann Van Der Wiele, Chairperson

DATED: November 30, 2017

Board members Louann Van Der Wiele, James A. Fink,, Jonathan E. Lauderbach, Barbara Williams Forney, 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.