

STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellee,

v

John J. Devers, Jr., P-12716 ,

Respondent/Appellant,

Case No. 99-97-RD

Decided: March 27, 2002

BOARD OPINION

Appearances: John J. Devers, Jr., Respondent/Appellant, in *propria persona* (via telephone)
Donald D. Campbell for Grievance Administrator/Appellee

I. Introduction

The respondent's license to practice law was revoked by the Oregon Supreme Court on January 22, 1999. Pursuant to the revocation in Oregon, the State of Michigan Attorney Grievance Administrator filed a petition for reciprocal discipline.¹ The Attorney Discipline Board issued an order to show cause. A hearing was conducted by Tri-County Hearing Panel #29. The hearing panel revoked Mr. Devers' license to practice law in Michigan.

Respondent Devers petitioned the Board for review of the hearing panel's decision, on the grounds that he was denied due process by the Oregon disciplinary system. Mr. Devers further asserts that the imposition of reciprocal discipline in this case would be clearly inappropriate.

The Attorney Discipline Board has conducted review proceedings, including review of the record, the decision and opinion of the Oregon Supreme Court, and due consideration of the briefs and arguments presented by the parties. For the reasons discussed more fully below, we affirm the decision of the hearing panel with respect to the finding that Mr. Devers was afforded due process of law in the Oregon proceedings. However, given the length of time which has elapsed between the initial discipline proceedings in Oregon and this review, the Board finds that the imposition of revocation, to run concurrently with the revocation of respondent's license in Oregon, would be

¹ MCR 9.104(B) states that:

Proof of an adjudication of misconduct in a disciplinary proceeding by another state or a United States court is conclusive proof of misconduct in a disciplinary proceeding in Michigan. The only issues to be addressed in the Michigan proceeding are whether the respondent was afforded due process of law in the course of the original proceedings and whether imposition of identical discipline in Michigan would be clearly inappropriate.

clearly inappropriate. We therefore modify the discipline imposed by the hearing panel and suspend Mr. Devers' license to practice law in Michigan for a period of three years, effective June 27, 2001.

II. Procedural History

The Grievance Administrator filed a petition for an order to show cause, attaching a copy of the opinion and order of the Oregon Supreme Court revoking Mr. Devers' license to practice law in Oregon. On July 27, 1999, the Board issued an order to show cause why a reciprocal order of discipline should not be entered.

Mr. Devers filed assertions under MCR 9.104 that he was not afforded due process of law in Oregon and that identical discipline would be clearly inappropriate in his case. The panel conducted a public hearing, and Mr. Devers appeared *pro se*. The parties agreed there were two issues before the panel: whether Mr. Devers was afforded due process in the Oregon disciplinary proceedings; and whether the imposition of identical discipline was clearly inappropriate in this case.

The hearing panel considered the arguments of the parties, the findings of the Oregon Bar and Oregon Supreme Court, and the supplemental briefs of the parties. The panel issued its report on June 6, 2001, concluding both that the Oregon proceedings provided Mr. Devers with due process and that revocation was the appropriate sanction in this case. The respondent was also ordered to pay costs in the amount of \$455.03. Respondent Devers petitioned for review of the panel's decision, and for a stay of the order of revocation. The request for stay was denied. Both the Grievance Administrator and the respondent filed briefs in support of their respective positions.

III. Discussion

A. Reciprocal Discipline

Reciprocal discipline may be defined as, "the imposition of a disciplinary sanction for conduct for which a lawyer has been disciplined in another jurisdiction." (ABA Standard for Imposing Lawyer Sanctions 2.9) The Michigan Court Rules make it clear that imposition of discipline by another state or by a federal court will result in a finding of misconduct by the Michigan Attorney Discipline Board:

[p]roof of an adjudication of misconduct in a disciplinary proceeding by another state or a United States court is conclusive proof of misconduct in a disciplinary proceeding in Michigan. [MCR 9.104(B)]

The only issues a respondent may address in challenging the imposition of reciprocal discipline are: whether or not the prior adjudication afforded the respondent due process of law; and whether the imposition of identical discipline by the Michigan Attorney Discipline Board would be "clearly inappropriate." (Id.)

B. Due Process

1. Due Process in Disciplinary Proceedings

a. U.S. Supreme Court

The United States Supreme Court has long recognized the right to due process of law in state proceedings involving revocation of professional licensure:

the Fourteenth Amendment is concerned with the substance and not with the forms of procedure...[t]he due process clause does not guarantee to a citizen of a State any particular form or method of state procedure. Its requirements are satisfied if he has reasonable notice, and reasonable opportunity to be heard and to present his claim or defence, due regard being had to the nature of the proceedings and the character of the rights which may be affected by it. [Missouri ex rel. Hurwitz v North, 271 US 40, 42; 46 S Ct 384, 385; 70 L Ed 818, 821 (1926), *citations omitted*.]

“The fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” Mathews v Eldridge, 424 US 319, 333; 96 S Ct 893, 902; 47 L Ed 2d 18, 32 (1976), *quoting* Armstrong v Manzo, 380 US 545, 552; [85 S Ct 1187, 1191; L Ed 2d 62, 66] (1965). The Supreme Court identified three factors which should be considered in analyzing due process issues:

[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. [Mathews, *supra*, p 335.]

Respondent Devers argues that this Board should look to the factors enunciated in Mathews and find that the Oregon disciplinary proceedings failed to provide him with due process. However, the Mathews court delineated those factors in an attempt to analyze whether the due process opportunity to be heard must be provided *prior* to the termination of a protected interest. The Mathews Court concluded that, with respect to Social Security disability benefits, “an evidentiary hearing is not required prior to the termination of disability benefits and that the present administrative procedures fully comport with due process.” Mathews, *supra*, p 349. Even if the Mathews factors require the hearing phase to take place prior to the imposition of sanctions, the fact remains that, in this case, Mr. Devers was provided with a hearing *before* his license to practice law in Oregon was revoked. The Oregon attorney discipline process provided Mr. Devers with notice and an opportunity to be heard, prior to revoking his license to practice law.

b. Michigan

The Supreme Court of Michigan also recognizes that disciplinary proceedings should include due process safeguards:

[d]ue process of law is essentially the legal equivalent of procedural fairness. It is a concept that “calls for such procedural protections as the particular situation demands.” [In the Matter of Honorable Christopher C. Brown, 461 Mich 1293, ____; 625 NW2d 744, 747, (1999), *quoting Mathews v Eldridge*, *supra*, pp 333-334 (1976) and In re Brock, 442 Mich 101, 110-111; [499 NW2d 752, 757] (1993).]

While the Brown case concerned Judicial Tenure Commission proceedings, the Attorney Discipline Board has also recognized that the protection of a respondent’s right to due process, and the factors set forth in Mathews, *supra*, apply to attorney discipline proceedings:

the private interest of protecting a respondent’s license to [practice] law is similar to the interest of a criminal defendant. At least the private interest concerns the protection of a person’s public reputation and the ability to earn a livelihood. [Grievance Administrator v Jay A. Bielfield, 87-88 at 17 (ADB 1993), *citing State Bar Grievance Administrator v Fried*, 388 Mich. 711; [202 NW2d 692] (1972).]

c. Oregon

Oregon acknowledges that attorney discipline proceedings must afford a respondent attorney due process:

[t]he “essential elements” of due process in the context of a lawyer discipline proceeding[] are notice and an opportunity to be heard and defend “in an orderly proceeding adapted to the nature of the case before a tribunal having jurisdiction of the cause.” [In re Complaint as to the Conduct of John J. Devers, Accused², 328 Or 230, 232; [974 P2d 191, 193] (1999), *quoting In re J. Kelly Farris*, 229 Or. 209, 214 [367 P2d 387, 390](1961).]

The Oregon Supreme Court followed the ABA Standards in its analysis and review of the trial panel’s findings of fact and imposition of discipline. The ABA standards:

are designed for use in imposing a sanction or sanctions following a determination by clear and convincing evidence that a member of the legal profession has violated a provision of the Model Rules of Professional Conduct (or applicable standards under the laws of the jurisdiction where the proceeding is brought). [ABA Standard for Imposing Lawyer Sanctions 1.3]

Oregon Bar Rule 5.2 states that, “[t]he Bar shall have the burden of establishing misconduct by clear and convincing evidence.” The Oregon Supreme Court followed the ABA Standards, and the Oregon Bar Rules, in expressly holding that Mr. Devers committed misconduct:

2 Hereinafter cited as “In re Devers, *supra*, p ____.”

[w]e find by clear and convincing evidence that the accused violated DR 3-101(B)^[3] by practicing law during his disciplinary suspension and that he violated DR 1-102(A)(3)^[4] by not disclosing to opposing counsel that he was suspended from the practice of law. [In re Devers, supra, pp 238-239.]

2. Oregon Proceedings

The Oregon Supreme Court found that Mr. Devers was not denied due process of law in the Oregon disciplinary proceedings. The court conducted a tripartite analysis of Mr. Devers' arguments. The Oregon Supreme Court addressed: the trial panel's decision to deny Mr. Devers' motion to adjourn the hearing; the panel's denial of Mr. Devers' motion for appointment of counsel; and the trial panel's decision to deny Mr. Devers' motion to disqualify one of the panelists.

a. Motion to Adjourn the Panel Hearing

First, the Oregon Supreme Court held that the trial panel's decision to deny Mr. Devers' motion to adjourn the panel hearing was not erroneous. The court further held that the trial panel's action in going forward with the hearing did not deprive Mr. Devers of due process of law.

The court initially noted that Mr. Devers had notice of the proceedings for many months prior to the first hearing. Mr. Devers does not dispute that he was provided with adequate notice of the hearing. His motion to adjourn the hearing, however, was filed less than a week before the scheduled hearing. His motion was denied.

Mr. Devers states that he retained an attorney, James Marvin, to represent him in the Oregon disciplinary proceedings. In the beginning of November, Mr. Devers contacted Mr. Marvin and ascertained that Mr. Marvin had evidently not yet prepared for the disciplinary hearing. On November 11, 1999, Mr. Devers terminated the services of Mr. Marvin. On November 14, 1999, the respondent notified the Oregon trial panel chair that he had fired his attorney. Mr. Devers then filed his motion for adjournment, to allow him time to obtain substitute counsel.

The trial panel denied the motion for adjournment. (Mr. Devers renewed his motion at the onset of the hearing. The renewed motion was also denied.) In its opinion, the Oregon Supreme Court noted that the charges against Mr. Devers had not changed in the many months the proceedings had been pending, and that there were no "surprise" witnesses to be called. The respondent affirmed that he was going to admit to the charges that he had practiced law during his

³ Oregon Code of Professional Responsibility Disciplinary Rule 3-101(B) states, "[a] lawyer shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction."

⁴ Oregon Code of Professional Responsibility Disciplinary Rule 1-102(A)(3) states, "[i]t is professional misconduct for a lawyer to...[e]ngage in conduct involving dishonesty, fraud, deceit or misrepresentation."

administrative suspension, but wanted more time to prepare to attack the credibility of the witnesses against him. The trial panel denied Mr. Devers' motion. However, the panel did limit the witnesses' testimony to the extent that Mr. Devers had admitted to the unauthorized practice of law. The Oregon court held that the trial panel did not err in denying the motion for an adjournment:

[t]he accused admitted to practicing law during his administrative suspension, and the trial panel chair limited the testimony of witnesses...[t]he accused makes no argument about what impact, if any, impeachment evidence might have had on issues of mitigation. [In re Devers, supra, p 233.]

b. Appointment of Counsel

Second, the Oregon Supreme Court held that the trial panel's decision to deny Mr. Devers' motion for appointment of counsel did not violate due process. In Dohany v Rogers, 281 US 362, 369; 50 S Ct 299, 302; 74 L Ed 904, 912 (1930), (*string citations omitted*), the U.S. Supreme Court held:

[t]he due process clause does not guarantee to the citizen of a state any particular form or method of state procedure. Under it he may neither claim a right to trial by jury nor a right to appeal. Its requirements are satisfied if he has reasonable notice and reasonable opportunity to be heard and to present his claim or defense due regard being had to the nature of the proceeding and the character of the rights which may be affected by it.

Mr. Devers claimed that he was not afforded due process because he was denied the assistance of counsel. However, Mr. Devers does not cite any authority which establishes that failure to appoint counsel to represent a respondent in attorney discipline proceedings constitutes a denial of due process.

The Oregon Supreme Court held that the trial panel did not err when it denied Mr. Devers' motion to appoint counsel. Despite the fact that disciplinary proceedings are quasi-criminal in nature (*see In re Ruffalo*, 390 US 544, 551; 88 S Ct 1222, 1226; 20 L Ed 2d 117 (1968)), and that a respondent has the right to be represented by counsel if he so chooses, there is no right to be represented by appointed counsel. Michigan similarly has held that, "in certain narrowly limited circumstances involving a respondent who is both indigent and incarcerated, the appointment of counsel may be appropriate under the most fundamental basic principles of due process and equal protection." Grievance Administrator v Peter R. Barbara, DP 62/86, p 4 (ADB 1988). Appointed counsel may also be appropriate when the mental capacity of the respondent is at issue. However, Michigan has not recognized a right to appointed counsel where the respondent is otherwise mentally capable, or is not incarcerated and indigent.

The Oregon Supreme Court found that Mr. Devers' case did not present the opportunity to define in what circumstances, if any, a right to appointed counsel in Oregon disciplinary proceedings may exist. The Oregon Court assumed that if a right were to exist, the person asserting the right to

counsel must be indigent. (In re Devers, supra, p 234, citing Lassiter v Department of Social Services, 452 US 18, 25; 101 S Ct 2153; 68 L Ed 640 (1981).) Mr. Devers did not claim that he was indigent. He does make mention, in his motion for adjournment of hearing, that he has been in Chapter 13 bankruptcy proceedings since 1995. His motion for adjournment indicated that he did not have any “discretionary” monies to expend on airfare to attend the hearing. He asked for an adjournment to allow him to make his airline reservations in time to take advantage of advance purchase fares.

Mr. Devers is not incarcerated. He has not made any argument that he is mentally incapable of participating in the disciplinary process. Likewise, Mr. Devers has not presented any evidence to establish that he is indigent. The Oregon trial panel’s decision to deny Mr. Devers’ motion for appointment of counsel did not deprive the respondent of his right to due process.

c. Motion to Disqualify Panelist

Third, the Oregon Supreme Court found that the trial panel did not violate Mr. Devers’ right to due process when the panel denied Mr. Devers’ motion to disqualify Ann Fisher, one of the panelists. The court held that Mr. Devers’ failure to timely object to the fact that Ms. Fisher allegedly slumbered during the proceedings, constituted a waiver of any right to object following the conclusion of the hearing. Similarly, the court also found that Mr. Devers’ lengthy delay in objecting to the behavior of that same panelist - in verbally and physically assaulting a fellow panelist - also constituted a waiver of his right to object. Finally, Mr. Devers claims that Ms. Fisher engaged in an *ex parte* communication with Martha Hicks, counsel for the Oregon State Bar.

Mr. Devers first claims that panelist Fisher bullied one of the other panelists, Dr. Kosterman, during the first recess of the panel hearing:

Ms. Fisher was observed actively intimidating the non-attorney member of the trial panel. She had him out in the hall, was physically assaulting and battering him. She was literally standing there pounding her finger into his chest to get him to go along with the position that she was announcing to him that I should not be given an adjournment to get counsel. [November 9, 1999 Panel Hearing Transcript⁵, p 30.]

Mr. Devers also asserts that Ms. Fisher slept during the panel proceeding, while testimony was being given. However, the respondent fails to present any evidence to support either of his claims that Ms. Fisher slept during the hearing, or that she intimidated one of her fellow panelists. Mr. Devers could have obtained an affidavit from Dr. Kosterman with respect to the alleged intimidation. He could have obtained an affidavit from the person who observed Ms. Fisher sleeping during the hearing. Mr. Devers offered nothing to support his allegations.

⁵ Hereinafter cited as “Tr, p ____.”

Based on Michigan Court Rule 9.104(B), proof of attorney discipline imposed by another jurisdiction is “conclusive proof of misconduct” in Michigan. The respondent bears the burden of showing cause why reciprocal discipline should not be imposed. Respondent Devers failed to meet his burden. He did not file his brief until the morning of the panel hearing. Mr. Devers did not present any evidence, affidavits, or testimony to the Michigan hearing panel. He did not attach any exhibits to his brief. Instead, he merely offered lengthy oral argument on his own behalf. The hearing panel stated:

[w]e are inclined to accept respondent’s oral arguments for what they were - arguments. Respondent was not sworn as a witness and he offered no testimony for consideration as evidence. Respondent’s unsupported, anecdotal comments regarding the proceedings in Oregon were simply insufficient to overcome the persuasive findings and conclusions of the Oregon Supreme Court in its January 22, 1999 opinion. [Grievance Administrator v John J. Devers, 99-97-RD (HP Report 06/06/01), p 3.]

Mr. Devers argues that the hearing panel improperly ignored the statements he made during the hearing. He asserts that by treating his statements as mere argument, rather than relying on them for evidentiary support, the hearing panel “downgraded the significance and content” of his remarks. (Respondent’s brief on appeal, pp 8-9.) Mr. Devers claims that the parties agreed they would not produce any evidence or witnesses during the panel hearing. While the transcript does not reflect such an agreement, Mr. Campbell stated, at the onset of the hearing, that he did not believe the rules of evidence applied in that particular proceeding, [because] “you didn’t need necessarily to take sworn testimony on it...” (Tr, p 10.)

Panelist Siegan attempted to clarify the proceedings. However, it is possible, given the prefatory language, to understand why Mr. Devers believed he was not obliged to present any witnesses or documentary evidence:

Member Siegan: You know, you said, Mr. Campbell, before we should not apply the Rules of Evidence. The Rules of Evidence would ordinarily require the taking of testimony, something under oath. Mr. Devers is suggesting that he has to make a statement to us about what happened, and that burden then shifts to you to rebut that, basically. So you’re in agreement that is basically can be argument between the two of you without the admission of any evidence or any, either testamentary evidence or documentary?

Mr. Campbell: I believe we're not entitled to have a full evidentiary hearing. I believe this panel can request us or order us, if you will, to conduct such if that would help you and aid you in making a determination. But if you're able from the facts that are presented in the course of our argument and from the documents we've submitted to make a decision in this case, then I don't think it's required and I don't think there's a due process violation, if you will, if you don't conduct such a hearing, and I'm not asking for such a hearing.

Member Siegan: And apparently he's not either. You're not either.

Mr. Devers: That's correct.

[Tr, pp 15-16.]

Mr. Campbell did not answer Ms. Siegan's question in the affirmative. Instead, he stated that he believed the panel could order a full evidentiary hearing if the panelists felt it would assist them in making a determination. Mr. Devers admitted he was not making such a request. Ms. Siegan stated that this was a unique situation and that she, "just want[ed] to make sure that we're all in agreement what rules we're following and what the standards are, and with that, if you're both comfortable with it then certainly we can proceed." (Tr, p 16.) Mr. Devers did not raise any objection or ask for any clarification.

Despite the panel's awareness that the parties had not insisted on a full evidentiary hearing, the panelists ultimately determined that Mr. Devers' comments were unsupported, anecdotal, and insufficient to rebut the findings of the Oregon court. (Grievance Administrator v John J. Devers, supra, p 3.) Even if Mr. Devers was not obliged to offer testimonial or documentary evidence, there is nothing in the record which suggests that he was prohibited or discouraged from offering factual support for his allegations and arguments. In fact, Panelist Sundquist clarified that Mr. Devers would submit a copy of a letter from the Oregon Bar, and that the letter would be marked as Exhibit 1. (Tr, p 71.) Ms. Siegan requested a copy of Oregon Bar Counsel Hicks' response to Mr. Devers' motion to dismiss, to be submitted after the hearing, as an exhibit. (Tr, p 71.) It does not appear that Mr. Devers ever submitted either the Oregon Bar letter, or the letter from Ms. Hicks, as the panel had requested.

Mr. Devers' claim that Ms. Fisher engaged in *ex parte* communication is perhaps his strongest argument for the recusal of panelist Fisher. However, Mr. Devers failed to provide any evidentiary support for his claim, either during the hearing or following the hearing. The note was purportedly authored by Ann Fisher and was sent to Oregon Bar Counsel Martha Hicks. The note (as quoted by Mr. Devers' brief in answer to the order to show cause at 12), stated:

Speaking of Devers - you need to tell Keith Raines^[6] that it will not be settled which will avoid the panel having to agree upon a sanction. I am uncomfortable with it just sitting -

Mr. Devers asserts that he received a copy of this note from Martha Hicks - the recipient of the original note from Ms. Fisher. He claims that Ms. Hicks' letter, "said effectively I don't know what to make of this, but I think you've got a right to know about it, and attached to it was a photocopy of a handwritten note that she had received from Ann Fisher." (Tr, p 47.)

Mr. Devers does not offer a copy of the note. He states, instead, that his copy of the note is "believed to be in the custody of" his estranged wife. (He does not claim that his wife refused to give him the document, or that he even asked for its return.) The respondent admits that the note was undated, and is unable to state with specificity at what point he received the copy of the note. Mr. Devers merely claims that the note came to light several months after the conclusion of the hearing, but before the trial panel issued its opinion. When questioned by a Michigan ADB panelist (Renee Siegan), Mr. Devers admitted that he received the note "very close in time" to a conference call in which the respondent, the Oregon trial panel chair, and Ms. Hicks all participated. (Tr, p 52.)

An affidavit from Martha Hicks setting forth her perception of Ms. Fisher's comments would have been extremely enlightening. Instead, the Board, like the Oregon Supreme Court and the ADB hearing panel, was left to ponder the possible meaning of the communication. Given the close proximity to the conference call, the note may have, as the Grievance Administrator suggests, merely addressed a scheduling matter.

Mr. Devers argues that Ms. Fisher's communication was inappropriate because it was sent only to Ms. Hicks; the respondent did not receive a copy from Ms. Fisher. Mr. Devers interprets the note to mean that Ms. Fisher believed there would not be a settlement in his case. The respondent claims that, during the course of his discipline proceedings, several settlement options had been proposed. Ms. Hicks had previously relayed each of those proposals to the State Professional Responsibility Board ("SPRB"), the functional equivalent of the Attorney Grievance Commission. Mr. Devers asserts that Ms. Fisher's note, "makes it clear that Ms. Fisher somehow had direct knowledge of the decision of the SPRB regarding a pending settlement proposal..." (Respondent's brief in answer to the order to show cause at 12.)

The meaning of the alleged note is not clear. The Board has not been provided with any information which might have clarified the meaning of the note. Mr. Devers has neglected to submit testimonial or documentary support to establish that, even if this communication occurred, it constituted an *ex parte* communication which deprived him of a fair hearing.

⁶ Keith Raines chaired the Oregon trial panel.

Mr. Devers' allegations, if substantiated, could raise due process concerns. Certainly, if a panelist sleeps during the misconduct or disciplinary phase of a hearing, it raises a doubt that the respondent was truly provided an opportunity to be heard. Likewise, the blatant impropriety of one panelist physically assaulting or verbally berating another, or engaging in *ex parte* communication, also offends the notion of a fair and impartial hearing.

The Oregon Supreme Court, however, did not reach an analysis of the facts alleged by Mr. Devers. Rather, the court held that due process was not violated because Mr. Devers failed to timely object to either the behavior or the somnolence of the panelist. The Oregon court stated:

[t]he Rules of Procedure do not specify a mechanism for dealing with allegedly inappropriate behavior if it occurs during a disciplinary hearing, but it is well established that, in trial proceedings, objections must be made in a timely manner. See, e.g., State v Walton, 311 Or 233, 248, 809 P2d 81 (1991) (motion for mistrial based on objectionable statements or conduct must be made immediately after the statement or conduct). An accused's failure to raise an objection in a timely manner in a disciplinary proceeding is unfair to the Bar and to the trial panel. In this case, if the accused had made timely objections, the trial panel would have had an opportunity to respond to his concerns and correct any improprieties. Because the accused's objections were not timely, we do not consider his argument that he did not receive a fair adjudication. Cf. State v Hitz, 307 Or 183, 188, 766 P2d 373 (1988) (claim of error must be presented in a timely manner.) [In re Devers, *supra*, p 235.]

Mr. Devers calls to the attention of the Board an error in the opinion of the Oregon Supreme Court. The court, in a footnote, stated that the *ex parte* communication occurred prior to the hearing, and therefore, any motion to recuse the panelist on that basis should also have been made prior to the hearing. Even if the Board accepts as true the respondent's assertion that the note was written and received as long as four months after the conclusion of the hearing, the Oregon court's error on this basis alone does not alter the outcome of this review. The fact remains that, even if the Board assumes the note was authored after the hearing, Mr. Devers has failed to meet his obligation to establish that he was denied due process of law. Mr. Devers has not offered anything, beyond his own interpretation, which would assist the Board in decoding the message, the context, or the potential effect of the note. Mr. Devers' failure to timely object to the alleged incidents of sleeping and assaultive behavior, and his failure to provide evidentiary support for his claim of prejudicial *ex parte* communication, weigh heavily against a finding that the Oregon trial panel's failure to recuse Panelist Fisher deprived the respondent of due process.

3. Respondent's Due Process Arguments on Appeal

Respondent Devers first argues that he was deprived of due process because the Oregon trial panel refused to recuse panelist Ann Fisher. Mr. Devers next argues that the Oregon Bar failed to establish misconduct by clear and convincing evidence. Finally, the respondent argues that he was

not afforded due process because the Oregon Supreme Court failed to conduct a *de novo* review of the trial panel proceedings.

a. Recusal of Panelist Fisher

This issue was previously discussed in this opinion. The Oregon trial panel's refusal to recuse one of the panelists does not insinuate a finding that Mr. Devers was deprived of due process. Instead, the respondent's failure to timely move for recusal suggests that Mr. Devers may have forfeited his prerogative to object to Ms. Fisher's continued service as a panelist.

The Oregon trial panel hearing concluded on November 21, 1996. Mr. Devers' motion to disqualify Ms. Fisher was not filed until May 3, 1997. His inaction between the time he was first aware of the alleged improprieties, and the filing of his motion, suggest that Mr. Devers did not believe that these events imperiled his right to due process.

b. Clear and Convincing Evidence of Misconduct

Mr. Devers was suspended from the practice of law in Oregon on several occasions. Relative to this case, he was first suspended in Oregon on April 20, 1993, for failure to pay his state-mandated malpractice premiums. A suspension for failure to pay bar dues was imposed on July 6, 1993. Mr. Devers paid both his bar dues and his malpractice premiums on October 11, 1993 and was reinstated to the practice of law in Oregon. Mr. Devers admits that he continued to practice law while administratively suspended for failure to meet his financial obligations to the Oregon State Bar.

Mr. Devers' license to practice law in Michigan had previously been suspended in 1992. He was suspended for 90 days and 121+ days on December 9, 1992. Mr. Devers' Oregon license was suspended on July 29, 1993, for a period of six months, based on the reciprocal discipline imposed by the Michigan Attorney Discipline Board.⁷ Mr. Devers argues that the Oregon Supreme Court failed to establish that he engaged in the practice of law while suspended under the reciprocal discipline.

i. Administrative Suspension

The Oregon Supreme Court separates the findings of misconduct into three periods: the administrative suspension; the disciplinary (reciprocal) suspension; and Mr. Devers' attempt to seek reinstatement to the practice of law in Oregon. Mr. Devers admits that he engaged in the unauthorized practice of law during his administrative suspension.

⁷ The effective date of the 1993 Oregon suspension was delayed until November 29, 1993, based on Mr. Devers' motion for reconsideration, and on his motion for stay filed with the United States Supreme Court. The U.S. Supreme Court denied the motion for stay on November 23, 1993.

ii. Suspension Based on Reciprocal Discipline

Mr. Devers complains that the trial panel failed to establish, by clear and convincing evidence, that he practiced law while suspended pursuant to reciprocal discipline. Mr. Devers does not deny that he committed the acts described in the Oregon Supreme Court's opinion. Instead, Mr. Devers claims that he was simply acting as a mere "scrivener" and, as a result, his actions did not rise to the level of "practicing law."

iii. Application for Reinstatement

Finally, the Oregon Supreme Court held that Mr. Devers committed misconduct when he submitted his application for reinstatement. Specifically, the Oregon court stated, "the accused submitted an application for reinstatement, on which he attested that he had not engaged in the practice of law during the period of his suspension." (In re Devers, supra, pp 239-240.) As previously discussed, Mr. Devers admitted he practiced law while suspended during both his administrative suspension and during his suspension secondary to reciprocal discipline.

Mr. Devers argued to the Oregon Supreme Court that, because he did not believe his conduct in drafting a settlement agreement constituted the practice of law, any misrepresentation on his part was not knowingly made. (Id.) Mr. Devers made this same argument to the Oregon trial panel. "The trial panel concluded that Mr. Devers was not credible in his argument. The Oregon Supreme Court deferred to the trial panel's assessment of the respondent's credibility. (Id., citing In re Brown, 326 Or 582, 598; 956 P2d 188, [197] (1998).) The court's findings with regard to Mr. Devers' application for reinstatement are clearly stated in its opinion:

The record is replete with evidence that the accused practiced law during his disciplinary suspension, knew that he did so, and falsely represented to the contrary on his reinstatement application. We find that the accused violated DR 1-102(A)(3)⁸ by claiming on his reinstatement application that he did not practice law during the period of his disciplinary suspension. [In re Devers, supra, p 240.]

The trial panel's finding - that Mr. Devers committed several acts of misconduct - is well-supported by the Oregon Supreme Court's analysis in this case. The findings of the Michigan hearing panel, with respect to the imposition of reciprocal discipline, are consistent with the holdings of the Oregon court:

[W]e conclude that respondent has failed to establish that he was not afforded due process of law in the Oregon proceeding which resulted in his disbarment by the

⁸ Oregon Disciplinary Rule 1-102(A)(3) states, "[i]t is professional misconduct for a lawyer to...[e]ngage in conduct involving dishonesty, fraud, deceit or misrepresentation."

Oregon Supreme Court effective March 23, 1999. We find nothing in the documentary evidence presented which suggests, much less establishes, that the Oregon proceedings did not follow the established rules in that state, that respondent was denied an opportunity to present his arguments to the Oregon Supreme Court, or that the proceedings failed to meet minimum accepted standards of due process. [Grievance Administrator v John J. Devers, 99-97-RD (HP Report 06/06/01), p 3.]

c. *De Novo* Review by the Oregon Supreme Court

Mr. Devers' final argument, with regard to due process, is that the Oregon Supreme Court failed to conduct a *de novo* review. The respondent claims that the Oregon court is obliged to conduct a *de novo* review of disciplinary appeals. Indeed, Oregon State Bar Rule of Procedure 10.6 states that, "[t]he court shall consider each matter *de novo* upon the record and may adopt, modify or reject the decision of the trial panel...in whole or in part and thereupon enter an appropriate order."

Mr. Devers complains that oral arguments before the Oregon Supreme Court were limited to thirty minutes for each side, and that the court chose to ignore portions of the record which were favorable to the respondent. However, Mr. Devers fails to provide this Board with any support for his argument. He does not cite to any portions of the trial panel record or pleadings which the court "ignored" but might be favorable to his position. In light of the court's lengthy factual analysis, discussion of relevant case law, and appropriate use of the "clear and convincing" standard of review, Mr. Devers' argument is without merit.

C. Is Revocation Clearly Inappropriate?

1. Revocation as Sanction, Absent Mitigating Circumstances

The first question presented to the Board - whether Mr. Devers was afforded due process in the Oregon proceedings - may be answered in the affirmative. The second issue the Board must address in this case is whether the imposition of identical discipline would be clearly inappropriate.

The Grievance Administrator argues that revocation, as ordered by the hearing panel, is consistent with prior opinions of the Attorney Discipline Board in cases involving similar misconduct. The Administrator cites, for example, Grievance Administrator v Perry Christy, 96-75-GA; 96-149-GA (ADB 1997) (18 month suspension increased to revocation) and Grievance Administrator v Richard C. Parchoc, 94-39-GA; 94-68-FA (ADB 1994) (suspension of three years and one day increased to revocation.)

The introductory paragraph to ABA Standard for Imposing Lawyer Sanctions 8.0 states that, "[s]evere sanctions should be imposed on lawyers who violate the terms of prior disciplinary orders." ABA Standard for Imposing Lawyer Sanction 8.1 declares that:

Disbarment is generally appropriate when a lawyer

(a) intentionally or knowingly violates the terms of a prior disciplinary order and such violation causes injury or potential injury to a client, the public, the legal system, or the profession; or

(b) has been suspended for the same or similar misconduct, and intentionally or knowingly engages in further acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession.

The commentary to ABA Standard 8.1 states that:

[t]he most common case is one where a lawyer has been suspended but, nevertheless, practices law. The courts are generally in agreement in imposing disbarment in such cases. As the court explained in Matter of McInerney, 389 Mass 528; 451 NE2d 401, 405 (1983), when the record establishes a lawyer's willingness to violate the terms of his suspension order, disbarment is appropriate "as a prophylactic measure to prevent further misconduct by the offending individual."

The Oregon trial panel found that Mr. Devers had committed misconduct, not only through his practice of law while suspended, but also in submitting a false affidavit in his application for readmission. If a Michigan hearing panel had determined that Mr. Devers had committed misconduct in violating an order of suspension, and in submitting a false statement to the court in his application for reinstatement, revocation of his license would have been a possible, perhaps probable, result under the ABA Standards and Michigan precedents, absent compelling mitigation or unusual circumstances.

2. A Delay as a Mitigating Factor

The American Bar Association's Standards for Imposing Lawyer Sanctions recognized delay in disciplinary proceedings as a mitigating factor. (*See* ABA Standard 9.32(i)). There is no doubt that the Oregon proceedings which gave rise to this reciprocal discipline case were protracted, spanning a period of approximately five years. Some, but not all, of the delays in the Oregon proceedings resulted from respondent's own actions. The proceedings in Michigan were instituted with the filing of a reciprocal discipline petition on July 15, 1999. A public hearing was conducted before Tri-County Hearing Panel #29 on November 9, 1999. Following that hearing, the parties filed additional memoranda. However, it was not until June 6, 2001 that the hearing panel issued the report and order which are the subject of the Board's review.

D. The Effective Date of Discipline in Michigan

The hearing panel below imposed identical discipline in the literal sense, that is, the panel imposed revocation of the respondent's license to practice law in Michigan effective March 23, 1999, the effective date of the revocation of respondent's license to practice law in Oregon.

However, respondent candidly admits that he practiced law in Michigan during the interval between the effective date of the revocation of his license in Oregon (March 23, 1999) and the date the hearing panel decision was issued in Michigan (June 6, 2001). Until the issuance of the hearing panel order in Michigan, the respondent was an actively licensed attorney in Michigan. At the time, his practice of law in Michigan was not in violation of any discipline order or court rule in Michigan.

The respondent asserts (and the Grievance Administrator concurs) that the most likely reason for the retroactive effective date in this case was the hearing panel's attempt to allow the two revocations to run as concurrently as possible and thus ameliorate the impact of these protracted proceedings. Respondent correctly argues, however, that the order of the Michigan hearing panel creates an intolerable *ex post facto* issue of potentially being found to have violated a revocation order in Michigan as long as two years before the order was actually issued. The Grievance Administrator's counsel has acknowledged the problem and suggests that, to avoid the *ex post facto* issue yet honor the panel's intent, the Board could amend the effective date of the panel's order. Following the normal procedure contemplated in MCR 9.115(J)(3), the revocation of respondent's Michigan license would be deemed effective 21 days after issuance of the hearing panel's order, i.e., on June 27, 2001.

This is not the first time that the Board has been confronted with a similar situation. In Grievance Administrator v Gerald W. Banks, 176-87 (ADB 1988), for example, the Board modified the effective date of reciprocal discipline imposed by a hearing panel. In its opinion, the Board stated:

MCR 9.104 does not require that the "identical discipline" imposed in reciprocal discipline be made retroactive to coincide with the discipline imposed in the other jurisdiction. Such an over-literal interpretation of the rule may . . . result in the entry of an *ex post facto* suspension which, as a practical matter, may be unenforceable.

V. Conclusion

The Grievance Administrator filed a timely petition for reciprocal discipline in this case and there are no facts to suggest that there was any untoward delay between the time the Administrator was first aware of the discipline imposed by Oregon and the filing of the petition in Michigan. Similarly, none of the delay in the issuance of the hearing panel's report may be attributed to the Administrator. Our primary concern is the substantial length of time which transpired between the misconduct charged and the conclusion of the Oregon discipline proceedings. When we further consider the length of the proceedings in Michigan, we must conclude that the imposition of "identical discipline" would be inappropriate in this case.

We therefore order that respondent's license to practice law in Michigan is suspended for a period of three years effective June 27, 2001. Respondent's reinstatement to the practice of law in Michigan will be governed by the applicable provisions of MCR 9.123(B) and MCR 9.124. Under those rules, respondent may petition for reinstatement up to 56 days before the expiration of the three year suspension period. In addition to establishing his fitness to return to the practice of law by clear and convincing evidence in reinstatement proceedings, respondent will be subject to MCR 9.123(C) which requires recertification by the Board of Law Examiners.

Board members Theodore J. St. Antoine, Nancy A. Wonch, Grant J. Gruel, William P. Hampton, and Rev. Ira Combs, Jr. concurred.

Board members Ronald Steffens, Marsha M. Madigan, M.D., and Marie E. Martell did not participate.