STATE OF MICHIGAN

Attorney Discipline Board

FILED
ATTORNEY DISCIPLINE BOARD
2021-Sep-28

Grievance Administrator,

Petitioner/Appellee,

v

Alexander H. Benson, P 43210,

Respondent/Appellant,

Case No. 20-58-GA

Decided: September 28, 2021

Appearances
Jordan D. Paterra, for Grievance Administrator, Petitioner/Appellee
Donald D. Campbell and Trent B. Collier, for Respondent/Appellant

BOARD OPINION

The Grievance Administrator filed a two-count formal complaint against respondent on August 7, 2020. This interlocutory petition for review involves only Count Two, which alleges respondent communicated ex parte with an official concerning a pending matter, in violation of MRPC 3.5(b). It is also alleged in Count Two that respondent violated or attempted to violate the Rules of Professional Conduct, in violation of MRPC 8.4(a) and MCR 9.104(4); 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 in conduct that is contrary to justice, ethics, honesty, or good morals, in violation of MCR 9.104(3).

Respondent filed a motion for partial summary disposition, arguing that Count Two should be dismissed as a matter of law pursuant to MCR 2.116(C)(8). Specifically, respondent asserted that Rule 3.5(b) does not apply to an arbitrator because an arbitrator is not a "judge, juror, potential juror, or other official" under MRPC 3.5(a). The Grievance Administrator responded that the motion should be denied because Rule 3.5 applies to an arbitrator as an "other official" under the rule.

On February 5, 2021, the hearing panel issued an order denying respondent's motion for partial summary disposition, concluding that a single arbitrator is an official within the meaning of MRPC 3.5(b). Respondent filed this interlocutory petition for review, arguing that (1) according to its plain language, Rule 3.5(b) does not apply to arbitrators; (2) ethics opinion RI-274 confirms that MRPC 3.5 does not apply to arbitrators; (3) the Grievance Administrator's assertion that arbitration is a "game or sport" lacks merit; and (4) the Administrator's catchall claims fail as well. The Grievance Administrator responded, asserting (1) MRPC 3.5(b) applies to attorneys advocating in arbitrations and prohibits ex parte communication with arbitrators; (2) the Michigan Rules of Professional Conduct contemplate attorneys in arbitration proceedings being bound by the MRPC; (3) Count Two of the formal complaint facially states misconduct in violation of the "catch all" rules; and (4) RI-274 does not apply as it addressed party-nominated arbitrators in a panel of arbitrators.

We review a panel's decision under MCR 2.116(C)(8), in accordance with the following well-established principles:

> All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. A motion under (C)(8) may be granted only where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Maiden v Rozwood*, 461 Mich 109, 119 (1999) (quoting *Wade v Dep't of Corrections*, 439 Mich 158, 163 (1992)). When deciding a motion brought under MCR 2.116(C)(8), only the pleadings are considered. Id., at 119-120. [*Grievance Administrator v Lisa Jeanne Peterson*, 20-51-GA (ADB 2021).]

When called upon to interpret and apply a court rule, courts apply the principles that govern statutory interpretation. *Haliw v Sterling Heights*, 471 Mich 700, 704-05; 691 NW2d 753 (2005). Clear and unambiguous language contained in a court rule must be given its plain meaning and is enforced as written. *Fleet Business Credit, LLC v Krapohl Ford Lincoln Mercury Co*, 274 Mich App 584, 591; 735 NW2d 644 (2007). The court may consult a dictionary to determine the plain meaning if an undefined term used in the court rules. *Wardell v Hincka*, 297 Mich App 127, 132; 822 NW2d 278 (2012).

Michigan Rule of Professional Conduct 3.5 provides, in pertinent part:

> A lawyer shall not:

> (a) seek to influence a judge, juror, prospective juror, or other official by means prohibited by law;
>
> [or]
>
> (b) communicate ex parte with such a person concerning a pending matter, unless authorized to do so by law or court order . . . .

The comment to the rule states that "[d]uring a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters, or jurors, unless authorized to do so by law or court order."

This rule has been consistently interpreted to include arbitrators. In *CSX Transp, Inc v Atchison, Topeka & Santa Fe Railway Co*, unpublished opinion of the Michigan Court of Appeals, No. 216522 (April 7, 2000), the Court of Appeals addressed whether sanctions should be imposed on a litigant for misconduct consisting of ex parte communications with an arbitrator. In that case, before the arbitrators' decision was issued, a risk manager employed by plaintiff contacted the neutral arbitrator, expressing displeasure at the purported decision, and imploring the arbitrators to discuss the matter further. Although not specifically an attorney discipline case, the defendant argued that this ex parte communication warranted a sanction. The court held:

> The trial court refused to impose a sanction, finding that the communication occurred after the decision was made and merely voiced plaintiff's objections to the decision. However, the trial court seemed to ignore that the communication occurred before the arbitrators' decision was released, although the contents of the communication clearly demonstrate that plaintiff knew what the decision was. **Therefore, the communication was an improper ex parte communication with an arbitrator.** See Rule 29 of the Commercial Arbitration Rules of the American Arbitration Association (prohibiting direct communication between a party and a neutral arbitrator). **See also MRPC 3.5 (prohibiting ex parte communications with a judge, juror, or other official).** Although an arbitrator is not a judge, an arbitrator's function is quasi-judicial. *Boraks v American Arbitration Ass'n*, 205 Mich App 149, 151; 517 NW2d 771 (1994); *International Union v Greyhound Lines, Inc*, 701 F2d 1181, 1185 (CA 6, 1983). **Plaintiff's communication with the neutral arbitrator was improper.** [*CSX Transp, Inc, supra* at *16-17 (emphasis added).]

Ultimately the court did not impose a sanction because the misconduct occurred during arbitration, not during litigation in the trial court.

Furthermore, the ABA Model Rule, which is nearly identical to MRPC 3.5, has been interpreted to include arbitrators. Just like MRPC 3.5, the Model Rule does not define "other official," and the comment only adds "masters" as an example. The prohibition of ex parte communication with judges and other officials under Rule 3.5(b) has been held to apply to communication with administrative law judges and others serving in similar capacities, including arbitrators. See, e.g., *Carrion v Linzey*, 342 Md 266; 675 A2d 527 (1996) (holding that rule prohibiting ex parte communications with "other official" was violated when a lawyer communicated with a member of an arbitration panel); *In re Lacava*, 615 NE2d 93 (Ind 1993) (members of medical malpractice review panel are "officials" for purposes of Rule 3.5); *Gates v USA Jet Airlines, Inc*, 482 Mich 1005; 756 NW2d 83 (2008) (vacating arbitration order for lawyer's submission of brief to arbitrator without service on opponent; concurrence says lawyer should be referred to disciplinary authority for violating Rule 3.5(b)).

Likewise, the Restatement (Third) of the Law Governing Lawyers, section 113 states that "[a] lawyer may not knowingly communicate ex parte with a judicial officer before whom a proceeding is pending concerning the matter, except as authorized by law." A comment to this section discusses the "officers covered by the prohibition against ex parte communications" and provides, in pertinent part:

> The prohibition applies to a judge, master, hearing officer, arbitrator, or other officer authorized to rule upon evidence or argument about a disputed matter. It also applies to other officials who have decisionmaking authority in the litigation, such as a jury commissioner or a clerk with responsibility to assign cases to judges. It also applies to indirect communications, as through a judge's clerk. [Restatement (Third) of the Law Governing Lawyers, § 113, comment d.]

Alternative dispute resolution has become a substantial part of the civil justice system, and lawyers who represent clients in alternative dispute resolution are governed by the Michigan Rules of Professional Conduct. See Comment to Rule 2.4. Allowing ex parte communications between one party's attorney and the arbitrator would undermine confidence in the arbitrator's neutrality, and the fairness of the process. This is why the Restatement's guidance on ex parte communications expressly applies to arbitrators. Restatement (Third) of the Law Governing Lawyers, § 113, comment d.

Respondent's argument that an "other official" must be someone who holds public office is meritless when applied to MRPC 3.5(b). First, the group within which "other official" is listed

is a group containing all types of decision makers, i.e., those sitting in a position of judgment – which logically would also include an arbitrator. The statutory interpretation doctrine of ejusdem generis provides that when a statute contains general words following a designation of particular subjects, the meaning of those general words is presumed to be restricted by the particular "kind, class, character, or nature as those specifically enumerated." *Welch Foods, Inc v Attorney General*, 213 Mich App 459, 464; 540 NW2d 693 (1995). Here, the similar trait of the separately listed judges, jurors, and potential jurors is that they are all decision makers. Therefore, the language "other officials" must be interpreted to include those officials "of the same kind, class, character, or nature," as "judge, juror [and] prospective juror." A juror may or may not hold public office. An arbitrator, therefore, would also belong in this class. As such, the hearing panel properly concluded that an arbitrator is an "other official" for purposes of MRPC 3.5.

There is also no basis to dismiss the "catch all" rules as argued by respondent. Lawyers who represent clients in alternative dispute resolution are governed by the Michigan Rules of Professional Conduct. The allegations in the formal complaint regarding the subject matter, tone, and content of the alleged ex-parte communications are sufficient to state a claim for violation of these "catch all" rules. See *Grievance Administrator v Timothy A. Stoepker*, Case No. 13-32-GA (ADB 2014) (noting that a general or catchall rule can serve as a principal basis for a charge or finding of misconduct).

Finally, respondent argues that "RI-274 confirms that MRPC 3.5 does not apply to arbitrators." In RI-274, the Michigan State Bar ethics committee addressed whether a party-nominated arbitrator is prohibited by ethics rules from communicating with the nominating party about the strategy or merits of a case. The committee concluded that it was not an ethical violation when the party-nominated arbitrator communicated ex parte with the nominating party during deliberations. However, RI-274 only looked at the application of this rule when an arbitration panel is comprised of two party nominated arbitrators and a third neutral arbitrator. The committee determined that, under those circumstances, the party-nominated arbitrator was allowed to discuss the case with the nominating party. This is a very different type of arbitration than one involving a single, neutral arbitrator. RI-274 says nothing about a neutral arbitrator, such as the case here.[1]

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[1] We recognize that RI-274 states that "MRPC 3.5 only prohibits certain ex parte communications with a court and does not address ex parte communications in the context of ADR systems." However, to the extent that this broad language is the basis for respondent's argument, there is no reasoning supporting such a blanket declaration in RI-274, and such a statement is contrary to the court decisions cited above, as well as the plain text of the Michigan Rules of Professional Conduct. Regardless, these ethics opinions, although instructive, are not binding. See *Evans & Luptak, PLC v Lizza,* 251 Mich App 187; 650 NW2d 364 (2002), lv den 467 Mich 935 (2002)*; Barkley v City of Detroit*, 204 Mich App 194, 202; 514 NW2d 242 (1994). Ethics opinions "do not represent controlling authority to be followed by

In RI-256, the ethics committee was asked to analyze the ethical strictures, if any, that guide a lawyer who has been selected or appointed in alternate dispute resolution proceedings to serve as a neutral mediator or arbitrator in dealing with unrepresented parties. Although MRPC 3.5 was not cited, the ethics committee recognized that ex parte communications with a neutral arbitrator are forbidden:

> A lawyer functioning as a neutral arbitrator or mediator in an alternative dispute resolution proceeding in which one or more of the participants is self-represented should assure that all parties understand that the lawyer's function is not to provide advice or counsel to any party, and that no party may rely on the lawyer to protect its interests or **(in arbitration, where ex parte communications are forbidden)** confidences. [RI-256 (April 8, 1996)(emphasis added.]

Accordingly, the hearing panel properly denied summary disposition as to the claimed violations of MRPC 8.4(a), 8.4(c), and MCR 9.104(1), (2), (3), and (4).

Board members Jonathan E. Lauderbach, Michael B. Rizik, Jr., Barbara Williams Forney, Karen D. O'Donoghue, Linda S. Hotchkiss, M.D., Michael S. Hohauser, Peter A. Smit, and Linda M. Orlans concur in this decision.

Board member Alan Gershel was recused and did not participate.

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hearing panels or the Board." *Grievance Administrator v Otis M. Underwood*, 99-58-GA (ADB 2001). The Bar agrees: "Opinions of the Committee do not have the force and effect of law and may not be relied upon as an absolute defense to a charge of ethical misconduct." Rule 7B of the Rules of the State Bar of Michigan Standing Committee on Ethics, Professional and Judicial. https://www.michbar.org/file/generalinfo/committee_pdfs/pec_rules.pdf