STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellee,

v

Timothy A. Stoepker, P 31297,

Respondent/Appellant,

Case No. 13-32-GA

Decided: April 17, 2014

Appearances:
Robert E. Edick and Dina Dajani, for the Grievance Administrator.
Donald D. Campbell and Colleen H. Burke, for the Respondent.

BOARD OPINION

Respondent has filed two applications for leave to petition for interlocutory review. The briefs in support advance a series of arguments stemming from the fact that the amended formal complaint charges violations of various rules other than MRPC 3.3(a)(1), which respondent considers most apt. Among the rule violations alleged is MPRC 8.4(b)'s prohibition against "conduct involving dishonesty, fraud, deceit, [or] misrepresentation . . . , where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer." For the reasons discussed below, we deny interlocutory review.

I.

Respondent asked the panel for an order requiring the Administrator to answer requests for admission. In its January 20, 2014 order, the hearing panel declined to require the Grievance Administrator to answer requests for admission, holding that such requests were beyond the scope of limited formal discovery authorized under MCR 9.115(F)(4). Respondent seeks interlocutory review on the grounds that the panel misunderstood its authority and that the answers to his requests

for admission "will either narrow the legal and factual issues before the hearing panel and this Board or they will highlight the need for further motion practice and appeals."

It is evident that the panel has spent considerable time and effort handling the extensive prehearing litigation in this matter. This application for interlocutory review involves an issue regarding the propriety of requests for admission submitted by respondent "under MCR 9.115(F)(4) and MCR 2.312" which arose at a prehearing conference held on December 16, 2013. The panel requested briefing as to the authority for such discovery in discipline proceedings and ultimately declined to compel the Administrator to answer respondent's requests for admission, which included requests such as, "Admit that the August 2005 election and the February 2007 election, as referenced in the First Amended Complaint, were separate and distinct elections" (Requests, p 2 ¶ 3), "Admit that the First Amended Complaint alleges that Mr. Stoepker gave false testimony under oath" (Requests, p 4 ¶ 8), and "Admit that the misconduct alleged in the First Amended Complaint is subject to Michigan Rule of Professional Conduct 3.3(a)." Also, an admission is sought regarding the application of MRPC 8.4(b) which has, along with respondent's MRPC 3.3(a) arguments, been the subject of several other filings by respondent before the panel and this Board.

The panel did not rule that it lacked the authority to obtain admissions to narrow the issues under MCR 9.115(F)(4) or otherwise. Rather, the panel correctly held that requests for admission pursuant to MCR 2.312 were outside of the scope of discovery proceedings the parties are entitled to pursue under the plain language of MCR 9.115(F)(4), which provides:

> Pretrial or discovery proceedings are not permitted, except as follows:
>
> (a) [exchange of documentary evidence and witness lists]
>
> (ii) Within 21 days following the filing of an answer, the administrator and respondent shall exchange the names and addresses of all persons having knowledge of relevant facts and comply with reasonable requests for (1) nonprivileged information and evidence relevant to the charges against the respondent, and (2) other material upon good cause shown to the chair of the hearing panel.
>
> (b) [depositions under certain circumstances, including for good cause shown and ordered by the panel]
>
> (c) The hearing panel may order a prehearing conference held before a panel member to *obtain admissions or otherwise narrow the issues presented by the pleadings*. [Emphasis added.]

Where appropriate, hearing panels have often ordered briefing, or the submission of joint pretrial orders (perhaps identifying stipulations of fact, disputed issues of fact, issues of law to be litigated, evidentiary issues and/or stipulations to admissibility of exhibits or other evidence, etc.), or have "otherwise [sought to] narrow the issues presented by the pleadings." However, under the foregoing rule, it is entirely within the discretion of the panel to determine whether a specific means of narrowing the issues would be useful in a particular matter.

Although the panel's order may have been couched in terms relating to the scope of discovery proceedings allowed, the panel was clearly also aware of its authority to take steps to narrow the issues, and did not find the request-for-admission approach to be fruitful in this instance. No abuse of discretion by the panel has been established, and the standard for invoking interlocutory review has not been met. As with other bodies considering whether to grant interlocutory review, this Board has traditionally required a demonstration that the appellant would suffer substantial harm by awaiting final judgment before taking an appeal. *Grievance Administrator v Sue E. Radulovich*, 06-50-GA (ADB Order, 9/29/2006) (citing MCR 7.205(B)(1)). Respondent has fallen far short of showing that the panel's ruling was erroneous, that the requests were in fact useful, or, even if they were, that the panel abused its discretion in deciding that they were not necessary to the efficient and fair disposition of this matter. Every case presents issues of fact and law to be resolved. As we will discuss further below, that is what hearings are for.

II.

Respondent also seeks application for leave to petition for interlocutory review of the panel's February 20, 2014 order denying respondent's motion in limine regarding the Grievance Administrator's burden of proof. He argues here, as he did below, that: (1) the Grievance Administrator should have to prove that respondent's alleged misstatements were material and made intentionally; (2) the panel should disregard the Grievance Administrator's allegations that respondent's alleged misstatements were in violation of MPRC 8.4(b) and, instead, treat them as allegations that he violated MRPC 3.3(a); and (3) claimed violations of the five "catchall" rules cited in the formal complaint are duplicative or address misconduct not alleged in the amended formal complaint, and therefore, should be dismissed.

Respondent has aggressively and repeatedly pursued his contention that the Administrator should be required to prove that statements respondent allegedly made as a deponent were

intentionally false (i.e., known to be false when made) and material, or else there can be no finding of misconduct under any rule. The respondent seeks a ruling from this Board that the panel was wrong in refusing to make the Administrator address the issue in requests for admission (see Section I) or in ordering the Administrator to try the case in accordance with respondent's view of the law, which would mean, in effect, supplanting the charges in the amended formal complaint with the rule respondent would have charged. The question before us is whether these questions must be settled on respondent's terms, now, or whether these questions of law can be addressed at the hearing, or in another manner such as a motion for summary disposition pursuant to MCR 2.116(C)(8) or (C)(10)[1], or even, if necessary, in an appeal from a final order of the panel.

The arguments presented by respondent have many layers and permutations. Our focus is to determine whether there will be prejudice or gross inefficiency from the failure to correct some clear legal error below. We find no error or unfairness in the panel's denial of the relief sought in respondent's motion in limine regarding the Grievance Administrator's burden of proof. Nor are we persuaded that the panel's reference to the Administrator's prosecutorial discretion signals a disregard of the applicable law, or that its citation to two cases (and failure to refer to another which respondent contends is key) constitutes the last word from the panel on the state of the law governing this case. The panel will ascertain the applicable law during proceedings before it, and apply it to concrete facts, as it deems orderly and efficient.

Respondent argues that *Grievance Administrator v Harvey I. Wax,* 98-112-GA (ADB 1999), requires that any alleged false statement be material and knowingly made in order to constitute misconduct under MRPC 8.4(b). Respondent insists that the issues raised in his application for leave will "dictate how the parties present their evidence and what evidence is presented," and that without intervention by this Board, "the parties will proceed with a hearing in which materiality and intentionality are not put at issue." However, the amended formal complaint alleges that: "Respondent's answers to these questions posed to him at his deposition were intentionally and knowingly false and misleading" (amended formal complaint, p 5, ¶ 31). And, as we discuss further below, the materiality of any statements can be addressed without interlocutory review.

Because the dismissal of the MRPC 3.3(a)(1) charges in *Wax* were not at issue on review, any application of *Wax* here must involve more general propositions discussed in that case. First, the Board considered it wise that the rules (specific ones not at issue here) did not provide for "strict

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[1] Respondent filed a motion for summary disposition under MCR 2.116(C)(10) on April 4, 2014.

liability in the event of a missatement in response to a request for investigation." Second, the Board stated that two broad rules should be read in light of two others focused more narrowly on the subject of misrepresentation in connection with a disciplinary investigation. Respondent may argue, at various appropriate times, that these and other maxims of rule construction are apt and compel a certain outcome based on *Wax* and other authorities.

Respondent also argues that allegations that he violated MRPC 8.4(b) by engaging in "conduct involving dishonesty, fraud, deceit, or misrepresentation where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer"[2] and other "catchall" rules[3] should be dismissed because they are "duplicative," or that their presence presents a risk that an erroneous application of the law will ensue. Respondent quotes a comment to the Restatement, which states, in part:

> [A] specific lawyer-code provision that states the elements of an offense should not, in effect, be extended beyond its stated terms through supplemental application of a general provision to conduct that is similar to but falls outside of the explicitly stated ground for a violation. For example, a lawyer whose office books and accounts are in conformity with lawyer-code provisions specifying requirements for them should not be found in violation of a general provision proscribing "dishonesty" for failure to have even more detailed or complete records. [1 *Restatement of The Law Governing Lawyers*, 3d, § 5, comment c, p 50.]

Elsewhere in that same comment it is said:

> Modern lawyer codes contain one or more provisions (sometimes referred to as "catch-all" provisions) stating general grounds for discipline, such as engaging "in conduct involving dishonesty, fraud, deceit or misrepresentation" (ABA Model Rules of Professional Conduct, Rule 8.4(c) (1983)) or "in conduct that is prejudicial to the administration of justice" (id. Rule 8.4(d)). Such provisions are written broadly both to cover a wide array of offensive lawyer

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[2] Amended formal complaint, p 5, ¶ 32 a).

[3] The other misconduct charged is violation or attempted violation of a rule of professional conduct and professional rules or standards, MPRC 8.4(a) and MCR 9.104(4), conduct prejudicial to the administration of justice, MRPC 8.4(c) and MCR 9.104(1), conduct exposing the profession to obloquy, contempt, censure or reproach, MCR 9.104(2), as well as conduct that is contrary to justice, ethics, honesty, or good morals, MCR 9.104(3).

> conduct and to prevent attempted technical manipulation of a rule stated more narrowly. On the other hand, the breadth of such provisions creates the risk that a charge using only such language would fail to give fair warning of the nature of the charges to a lawyer respondent . . . and that subjective and idiosyncratic considerations could influence a hearing panel or reviewing court in resolving a charge based only on it. [*Id.*]

To the extent respondent complains of a lack of notice regarding the charges, it must be noted that the precise facts giving rise to the allegations of misconduct are spelled out in detail in the complaint. It certainly cannot be said that the amended formal complaint fails to reasonably inform respondent of the nature of claims against which he is called on to defend. MCR 2.115(A).

Also, with regard to the argument that "duplicative" charges of misconduct (i.e., assertions that a particular set of facts constitutes violation of more than one rule) must necessarily be dismissed, that is simply not consistent with the well-established practice in this state and others. Courts, this Board, and hearing panels frequently conclude that certain conduct violates both a specific and a very general rule, or more than one general rule. See, e.g., *Grievance Administrator v Lopatin*, 462 Mich 235, 254; 612 NW2d 120 (2000) (affirming Board's conclusion that various catchall rules had been violated in addition to rule prohibiting *ex parte* contact with judges); *In Re Balliro*, 453 Mass 75; 899 NE2d 794 (2009); *In Re Forest*, 158 NJ 428; 730 A2d 340 (1999); *Grievance Administrator v Michael L. Stefani*, 10-113-GA (ADB 2013), pp 15-16 (affirming panel majority's conclusion that rules "deal[ing]with generalized statements of the duties of honesty and the like" in addition to the principal MRPC 4.1 charge, even though they were "secondary" and did "not alter the nature or character of the conduct in [the] case"); and *Grievance Administrator v David C. Anderson*, 96-224-GA (HP Report 4/3/98) (finding violation of MRPC 3.3(a)(2) and (4) as well as the "catchall" rules).

At times, a "general" or "catchall" rule may not be redundant but may serve as a principal basis for a charge or finding of misconduct. See, e.g., *Grievance Administrator v Fried*, 456 Mich 234; 570 NW2d 262 (1997). See also a case cited by the panel, *Grievance Administrator v Keith J. Mitan*, 06-74-GA (ADB 2008) (applying MRPC 8.4(b) and MCR 9.104(A)(3) where MRPC 3.3(a)(1) violation not found but respondent intentionally *withheld* material information from court).

Courts and discipline adjudicators have experience in navigating the concerns mentioned in the foregoing Restatement comment and in sorting out the appropriate role of general rules in

identifying the bounds of professional conduct. See, e.g., *In Re Haley*, 476 Mich 180, 194-198; 720 NW2d 246 (2006) (specific rules of conduct control over related but more general), and compare *Grievance Administrator v Deutch*, 455 Mich 149, 163-165; 565 NW2d 369 (1997) (plurality opinion rejecting Board's construction and holding that "MCR 9.104(5) must be read in conjunction with MRPC 8.4(b), so that only criminal convictions that reflect adversely on an attorney's honesty, trustworthiness, and fitness as a lawyer constitute 'misconduct'"). See also *Stefani, supra,* (affirming finding of overlapping or cumulative rule violations and decision not to increase discipline where same facts constituted basis for multiple rule violations). And see, *Grievance Administrator v Michael L. Stefani*, 10-113-GA (HP Report 11/16/2011), pp 23-24 (statement of William B. Dunn dissenting from application of catchall rules but concurring in finding that MRPC 4.1 was violated, citing another panel report stating: "these vague and ill defined catchall rules add nothing to the important function of protecting the public, the profession and the courts in this case").

Of course, as the vast body of cases in which these catchall rules are involved show, not every application of a general rule gives rise to a lack of notice to a respondent or to an impermissible broadening of a specific rule delineating prohibited or permitted conduct. And when such concerns do arise, hearing panels can address these concerns initially. In this case, the complaint alleges that false statements were intentionally made, and arguments about whether such statements were material and the legal significance of materiality can be made. Respondent raises the concern that the Administrator may argue that these elements are not essential to a finding of misconduct. The hearing panel can address this as well as any problems of "possible vagueness[,] overbreadth, . . . [and] redundancy" that may arise in adjudications in the many states with a rule similar to MRPC 8.4(b).[4] As is true in other areas of the law, the contours or applicability of MRPC 8.4(b) or other rules, charged separately or in combination, may not be precisely delineated in every conceivable factual scenario, but this does not mean that interlocutory review is necessary or appropriate to settle all questions which may arise in a pending proceeding.

Nothing in the panel's orders precludes respondent from raising and supporting his arguments in a motion for summary disposition, a trial brief, a motion for involuntary dismissal (MCR 2.504(B)(1)), in an offer of proof, in closing argument, or at other appropriate times in the context of the hearing in light of the record that is actually developed. And the consequences of the

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[4] 2 Hazard, Hodes & Jarvis, *The Law of Lawyering* (3rd ed), §65.6, p 65-11.

Administrator's election not to charge MRPC 3.3(a)(1) are not known at this point. In sum, having carefully considered both applications for leave to petition for interlocutory review, we are not persuaded that respondent will suffer substantial harm if we do not intervene and direct the panel to conduct this case in accordance with respondent's requests, or that review of a final decision will not be an adequate remedy for any asserted errors.

A final observation about these petitions for interlocutory review is in order. One brief in support begins with a procedural history of the case which essentially amounts to a broadside complaining of panel rulings having nothing to do with the relief sought, and asserts that: "'Kafkaesque' may soon be too mild a word to describe these proceedings." In the other brief, respondent asserts that: "The hearing panel has played the role of an enabler." Without prejudging any issues which may arise subsequently, we are compelled to note that our review of the orders and rulings of the panel to date indicates that these ad hominem attacks are inaccurate and inappropriate. Again, without foreclosing review of any issues, in light of the tenor of respondent's briefing, we think it important to remark that nothing we have seen so far undermines our confidence that the panel's rulings reflect, and will continue to reflect, thoughtful consideration of the issues and a prudent determination to try the case in a manner that is fair to all concerned.

Board members James M. Cameron, Jr., Craig H. Lubben, Sylvia P. Whitmer, Ph.D., Rosalind E. Griffin, M.D., Carl E. Ver Beek, Dulce M. Fuller, and Louann Van Der Wiele concur in this decision.

Board members Lawrence G. Campbell and Michael Murray did not participate.