STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellant,

v

David A. Binkley, P 31643,

Respondent/Appellee,

Case No. 11-32-RD

Decided: November 9, 2012

FILED
ATTORNEY DISCIPLINE BOARD
12 NOV -9 PM 1:57

Appearances:

Patrick K. McGlinn, for the Grievance Administrator, Petitioner/Appellant
Kenneth M. Mogill, for the Respondent/Appellee

BOARD OPINION

This reciprocal discipline matter was commenced pursuant to former MCR 9.104(B) after respondent was reprimanded in another jurisdiction. The hearing panel held that, while due process had been afforded to respondent in the original proceeding, imposition of the lowest form of discipline in this state, a reprimand, was clearly inappropriate under the circumstances. The panel dismissed the order to show cause and the Administrator petitioned for review. We conclude that an order finding misconduct and imposing no discipline should be entered.

A passage from the hearing panel's report succinctly summarizes the essential facts and reasons for the panel's order of dismissal:

> In the discipline proceeding conducted in a federal court in North Carolina, respondent was found to have violated North Carolina Rule of Professional Conduct 4.2, which states:
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> > NCRPC 4.2(a):
> >
> > During the representation of a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be

> represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

North Carolina's version of Rule 4.2 is substantially similar, but not identical, to Michigan Rule of Professional Conduct 4.2 which itself is based upon Model Rule 4.2 as adopted by the American Bar Association:

> MRPC 4.2:
>
> In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

It is not disputed here that Respondent Binkley represented the plaintiffs in civil matters then pending in the U.S. District Court in North Carolina; that Mace Watts was a named defendant in the civil case; and that Watts was represented by counsel with regard to a pending criminal investigation involving many of the same parties and transactions, but that Watts was apparently not represented by counsel in the civil case. Counsel for the respective parties in this case have ably briefed and argued their respective positions with regard to such issues as whether or not Binkley communicated with [Watts] about the "subject of [Binkley's] representation," and whether Watts' representation by a lawyer with regard to a criminal investigation was, by definition, representation by another lawyer in the "matter" for which Binkley was representing clients.

In the final analysis, the panel is struck by respondent's good faith effort to do the right thing. We find that the North Carolina rule is ambiguous. We find that Mr. Binkley certainly did contact the attorney who represented Mr. Watts. We also find that Watts' attorney, Mr. Calloway, made it clear that he did not represent Watts in the civil case and that he gave respondent no reason to believe that he would have any objection to direct communication between respondent and Watts. We find that the actions of Mr. Binkley were intended for the best interests of his actual client and in no way

> harmed his client, or, for that matter, Mr. Watts. Based on what was presented to us, this panel cannot clearly find that the conduct of Mr. Binkley in North Carolina would have been improper under the Michigan Rules of Conduct. We concluded, for all of these reasons, that a reprimand would be "clearly inappropriate" within the meaning of our court rule.
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> Michigan Court Rule 9.106 [Types of Discipline; Minimum Discipline] states that there are four types of discipline in Michigan: disbarment, suspension for a specified term not less than 30 days, reprimand and probation under the strict criteria of MCR 9.121(C). Having concluded that a reprimand, the lowest form of discipline available under the rules, would be inappropriate, we decline to take further action and will order that this matter be dismissed. [HP Report, pp 5-6.]

Respondent argues that dismissal was appropriate for the reason that due process was not afforded in the North Carolina federal court because the decision of that court was manifestly wrong on the law and unsupported by evidence. We agree with the hearing panel that a deprivation of due process in the original proceeding has not been established by respondent.

The next question we must address is whether dismissal was appropriate in light of the hearing panel's determination that it would be clearly inappropriate to impose discipline identical to that imposed in the original proceeding, a reprimand. As can be seen from the portion of the report quoted above, the hearing panel found that the imposition of identical discipline was clearly inappropriate. Petitioner argues that this was error and that dismissal is not an option under former MCR 9.104, which provided in part:

> (B) Proof of 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.

In arguing for affirmance, respondent contends that the federal court in North Carolina committed serious error in applying its own rule, and that this and various mitigating factors including respondent's unblemished record, his good character, and the circumstances of this case, make a reprimand clearly inappropriate and dismissal proper.

Respondent cogently argues that "matter" as used in North Carolina's Rule 4.2, which rule strongly resembles the ABA Model Rule, means a legal matter, not subject matter or related factual issues. Respondent cites authorities construing similar rules, including *Illinois v Santiago*, 236 Ill 2d 417; 925 NE 2d 1122 (2010) (no Rule 4.2 violation where detectives and state's attorneys handling a criminal matter questioned defendant who was represented in child protective proceedings arising from the same factual setting).

The North Carolina federal district court did not take this approach in analyzing respondent's conduct. Rather, as the court stated, it viewed the fact that Watts was not represented in the civil matter to be "of no consequence" and concluded that "Watts was represented in the criminal proceeding concerning the matter to which Binkley's communication related" :

> The record reveals that on at least two separate occasions in January 2010, Binkley met with Richard Mace Watts, a defendant in the *Thompson* and *2433 South Blvd.* actions who was represented by counsel in connection with a separate, but related ongoing criminal investigation. Binkley knew that Watts was represented by counsel at that time and had, in fact, previously contacted Watts' attorney in an attempt to secure permission to speak with Watts. Binkley also knew that the criminal investigation for which Watts had retained counsel involved the same subject matter as involved in the *Thompson* and *2433 South Blvd.* actions. Nevertheless, Binkley met with Watts and discussed with him real estate transactions involved in the *Thompson* and *2433 South Blvd.* actions without the consent of Watts' attorney.
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> The fact that Watts was not represented by counsel in the *Thompson* and *2433 South Blvd.* actions is of no consequence. Rule 4.2 prohibits communications with any person, whether or not a party to a formal adjudicative proceeding, contract or negotiation, who is represented by counsel **concerning the matter to which the communication relates**. N.C. Rev. R. Prof. Conduct 4.2 cmt. 8 (2010) (emphasis added). Because Watts was represented in the criminal proceeding concerning the matter to which Binkley's communication related, Rule 4.2(a) required that Binkley secure counsel's express consent prior to talking with Watts.
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> Binkley's conduct is also not excused by the fact that Watts may have initiated the contact with Binkley. Rule 4.2's prohibition applies even though the represented person initiates or consents to the communication. N.C. Rev. R. Prof. Conduct 4.2 cmt. 8 (2010). Because Watts' attorney had not consented, Binkley was prohibited

> from communicating with Watts directly. Binkley willfully engaged in direct communications with Watts concerning matters for which Watts had secured legal representation without counsel's consent in violation of Rule 4.2(a) and this court's ethical standards. [*Thompson v Bank of America*, (Docket No 7:09-CV-89), *In Re David A. Binkley*, unpublished order of the United States District Court for the Eastern District of North Carolina dated November 5, 2010 (Docket No. 7:10-CV-28), pp 7-8.]

In the proceedings before the hearing panel, respondent testified that he ran into Watts who told respondent "I want to help. Here is my lawyer's name . . . . Give him a call and we will set something up." (Tr, p 23.) Respondent called the lawyer who made it explicitly clear that "he was only going to represent Mr. Watts as it related to the FBI investigation surrounding the fraud that occurred." (Tr, p 24.) Respondent's unrebutted testimony was that he asked the lawyer whether he was representing Watts in the civil case, and received this response: "I don't know. I am not dealing with that. That's – whatever he does, he does. My only thing is with the FBI." (Tr, p 25.) Respondent also testified that he viewed the attorney as his "only conduit to Mace Watts" who had a wealth of information and that after Watts' criminal attorney declined to facilitate respondent's interaction with Watts regarding the civil matter, respondent "dropped it." (Tr, pp 25-26.) Then, Watts unilaterally appeared at a meeting between respondent and another witness, which gave respondent pause to consider whether he should speak to Watts in light of Rule 4.2. Respondent ran through a mental checklist and determined that Rule 4.2, as he understood it, imposed no bar to communicating with Watts regarding the civil matter and had a conversation with Watts that night. (Tr, pp 26-29, 37-38.) Respondent met Watts later in North Carolina to discuss evidence supporting respondent's clients' fraud claims against certain banks and developers. (Tr, pp 17, 29-30.) Watts' criminal lawyer did not, thereafter, "call [respondent] up and say, you son of a gun, what are you doing talking to my client?" (Tr, p 34.) And Watts did not complain of the contact. Rather, Bank of America and developers, parties opposing respondent's clients, initiated the disciplinary inquiry. (Tr, pp 32-33.)

The text and comment of North Carolina's Rule 4.2 differs somewhat from the Michigan rule, but it is not explained just how a violation has been established under the text of the North Carolina rule but not under the Michigan rule. Under both, it is not relevant that the represented person initiated the contact, but that is not the crux of respondent's defense. Respondent argues that

Watts was not represented in the civil matter and that he confirmed this with Watts' criminal lawyer who essentially acquiesced in, or at least did not forbid, respondent's contact with Watts related to the civil matter.

Although the North Carolina federal district court's decision reads Rule 4.2 very broadly, and perhaps in a novel way, we have not been presented with a sufficient basis for us to conclude that we are entitled to disregard former MCR 9.104(B)'s conclusive presumption that misconduct has been established in this case. Accordingly, we will vacate the order of dismissal.

However, as for the level of discipline to be imposed, we agree with the hearing panel that identical discipline is clearly inappropriate. The circumstances of this case present one of those exceedingly rare instances in which the imposition of discipline, even a reprimand, is inappropriate. The reasons justifying this type of result were summarized by this Board in a previous case:

> An order finding misconduct and imposing no discipline will rarely be entered. . . . . For an order finding misconduct but imposing no discipline to be appropriate, the misconduct would have to be so highly technical, the mitigation so overwhelming, or the presence of other special circumstances so compelling that the imposition of a reprimand would be practically unfair. . . . [A]n order imposing no discipline sends an odd and mixed message that misconduct has occurred, but that discipline – even a simple declaration affirming the purpose of the rule – is not warranted. Therefore, "no discipline" orders should be reserved for situations in which it would be utterly pointless to impose professional discipline notwithstanding that misconduct exists under the letter of the law. We presume that through the exercise of sound prosecutorial discretion few of these cases will reach hearing panels. [*Grievance Administrator v Ralph E. Musilli*, 98-216-GA (ADB 2000), pp 6-7.]

We conclude that the reasons for imposing no discipline, as articulated in *Musilli, supra,* are present in this case. Accordingly, we will vacate the panel's order of dismissal and enter an order finding misconduct but imposing no discipline.

Board members Thomas G. Kienbaum, James M. Cameron, Jr., Rosalind E. Griffin, M.D., Andrea L. Solak, Carl E. Ver Beek, Craig H. Lubben, Lawrence G. Campbell, and Dulce M. Fuller concur in this decision.

Board member Sylvia P. Whitmer, Ph. D., was absent and did not participate.