

STATE OF MICHIGAN

Attorney Discipline Board

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ATTORNEY DISCIPLINE BOARD

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Grievance Administrator,

Petitioner/Appellee/Cross-Appellant,

v

David M. Stimpson, P 64583,

Respondent/Appellant/Cross-Appellee,

Case No. 09-77-GA

Decided: December 8, 2011

Appearances:

Todd A. McConaghy, for the Grievance Administrator

Donald D. Campbell, for the Respondent.

BOARD OPINION

On August 23, 2006, Respondent was retained by Dr. Richard Zarbo, chairman of the pathology department at Henry Ford Hospital, to commence divorce proceedings against his wife, Alicia Zarbo. Mrs. Zarbo had been diagnosed in 1987 with multiple sclerosis (MS), and with "MS-related cognitive deficits" in a September 1, 2006 Henry Ford neurology evaluation arranged by Dr. Zarbo. The written neurology note was faxed to respondent by Dr. Zarbo on September 5, 2006, and is in the record as Petitioner's Exhibit 3. It referenced her "difficulties with memory" and the fact that it is "difficult for her to maintain her attention for complex tasks." The report contained the conclusion that Mrs. Zarbo's "ability to manage complicated tasks and to make decisions [is] probably impaired" and it closed with the recommendation that she "consider obtaining legal guardianship or power of attorney to help her manage her financial and medical affairs." Dr. Zarbo's fax cover sheet states: "note recommendations at end of write-up."

On September 15, 2006, respondent personally served Mrs. Zarbo at her home with the Summons, Verified Complaint for Divorce, Verified Statement, and Notice of Order for Mediation. Five days later, on September 20, 2006, respondent again met with Mrs. Zarbo at her home to obtain

her signature on an Acknowledgment of Service, Waiver of Conflict of Interest, Defendant's Answer to Plaintiff's Complaint, Stipulated Order Opting Out of the Washtenaw County Friend of the Court Services, Advice of Rights Regarding Use of Friend of the Court Services, and Consent Judgment of Divorce. Later that day, Mrs. Zarbo's brother arrived from out-of-town and took her to a pre-arranged appointment with divorce attorney Monika Sacks. Ultimately, Ms. Sacks represented Mrs. Zarbo and another attorney represented Dr. Zarbo, and the divorce proceedings were resolved on terms other than those set forth in the documents drafted by respondent.

The formal complaint alleged various forms of misconduct, and the Administrator argued to the panel that they were all established. The hearing panel analyzed each alleged rule violation and found

by a preponderance of the evidence that respondent violated MRPC 4.3, in that he failed to make reasonable efforts to correct a misunderstanding when he knew, or should have known, that an unrepresented person, Alicia Zarbo, misunderstood respondent's role in the matter as alleged in paragraph 28(e) of the formal complaint. We further find that respondent violated MRPC 8.4(a) and MCR 9.104(A)(4) as alleged in paragraph 28(g); that respondent's conduct was prejudicial to the administration of justice in violation of MRPC 8.4(c) and MCR 9.104(A)(1); that respondent's conduct exposed the legal profession to obloquy, contempt, censure or reproach in violation of MCR 9.104(A)(2); and that he engaged in conduct contrary to justice, ethics, honesty, or good morals in violation of MCR 9.104(A)(3). [Report on misconduct (March 29, 2011), p 3.]

The panel also found that the other allegations of misconduct were not proved. At a separate hearing on sanctions, the Administrator argued that the appropriate discipline in this matter was a 30-day suspension. Respondent argued for dismissal. The hearing panel imposed a reprimand.

Respondent filed a petition for review, arguing that the panel erred in finding misconduct. The Grievance Administrator filed a cross-petition for review, arguing that the panel erred in dismissing various charges of misconduct and that discipline should be increased to a suspension. We find no basis for disturbing the findings of the hearing panel. We do, however, conclude that a suspension of 30 days is appropriate.

Respondent frames the issue in his brief in support of his petition for review as follows:

Should the charge of violating MRPC 4.3 and attendant catch-alls have been dismissed where all of the direct evidence of Mrs. Zarbo's

statements reflect that she understood Attorney Stimpson's role as her husband's attorney, where Attorney Stimpson reasonably believed she was capable of understanding his role as her husband's attorney, where he confirmed her understanding by explaining both verbally and in a writing his role, and where she confirmed her understanding both verbally and in a signed form that explained his role?

A hearing panel's factual findings are reviewed for "proper evidentiary support on the whole record." *Grievance Administrator v Lopatin*, 462 Mich 235, 247-248 n 12; 612 NW2d 120 (2000); *Grievance Administrator v T. Patrick Freydl*, 96-193-GA (ADB 1998).¹ "[I]t is not the Board's function to substitute its own judgment for that of the panels' or to offer a *de novo* analysis of the evidence." *Grievance Administrator v Carrie L. P. Gray*, 93- 250-GA (ADB 1996), lv den 453 Mich 1216 (1996).

Respondent contends that the panel erred in finding a violation of MRPC 4.3. Among other things, respondent argues that the report and other evidence establishes that Mrs. Zarbo was competent, and/or that the panel erred in imposing upon respondent a duty to ensure that she was. Respondent also suggests that there is a disconnect between the panel's findings and Mrs. Zarbo's entering into an agreement to be represented by attorney Sacks, and giving Ms. Sacks consent to speak with Mrs. Zarbo's brother and to attorney Schieve regarding conservatorship. It is argued that: "Attorney Sacks' own contemporaneous conduct show that Mrs. Zarbo was competent to consider, sign and be held to various decisions and agreements at exactly the same time-frame that Attorney Simpson had met with Mrs. Zarbo."²

This argument is flawed. First, it misses the point of MRPC 4.3. That rule does not impose a general competence test. Rather, MRPC 4.3 requires that, "[w]hen [a] lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding" (emphasis added).

Moreover, it makes no sense to attempt to equate Mrs. Zarbo's decisions to sign the papers drawn up by respondent under the circumstances here with the actions, statements and decisions she made in the presence of her brother, an attorney who did not represent Dr. Zarbo, and other

¹ "This standard is akin to the clearly erroneous standard . . . use[d] in reviewing a trial court's findings of fact in civil proceedings. See MCR 2.613(C)." *Lopatin, supra*.

² Respondent's brief in support of petition for review, p 7.

disinterested, court-appointed attorneys. The Guardian Ad Litem testified as to his concerns that Dr. Zarbo was pressuring Mrs. Zarbo and that, given her capacity, she would not be able to defend herself or make decisions that were in her best interest. Ms. Sacks testified that she received a fax signed by Mrs. Zarbo purporting to discharge her, and that later that day Mrs. Zarbo called with questions about the matter. When Ms. Sacks pointed that out to Mrs. Zarbo, Mrs. Zarbo dismissed it: “oh, Richard made me do that.”

Respondent also argues that the hearing panel’s finding is undercut by Mrs. Zarbo’s reference to respondent as “my husband’s attorney.” Obviously, one could use this term to refer to an attorney without fully understanding the attorney’s role in a particular matter.

Additionally, respondent seeks to counter or cast into doubt the strong evidence that Mrs. Zarbo was suffering from cognitive deficiencies with repeated references to the asserted fact that she made pesto in the presence of the Guardian Ad Litem. See respondent’s brief, at p 14 (“Attorney Giesler testified to [Mrs. Zarbo] making pesto”). Without lending too much credence to this argument, even if it had a factual basis, we do note that the argument is actually without a factual basis.³ Perhaps more relevant is the testimony of Mr. Giesler to the effect that Mrs. Zarbo was “childlike” and could not explain what was going on in the divorce proceedings and, in his opinion, did not understand them,⁴ and the similar testimony of the conservator, Ms. Schieve.⁵

Finally, respondent argues that “nowhere in Attorney Giesler’s testimony did he testify that Mrs. Zarbo did not understand ‘the nature and the effect of the divorce action.’” In fact, this is

³ See testimony of Mr. Giesler (the GAL):

- A. . . . Because when I called to set up a meeting she was more concerned about some sort of cooking club she was in than –
- Q. [by counsel Campbell] In fact, she made pesto while you were there?
- A. Yeah, pesto. She told me that she had some pesto sauce club or something going on.
- Q. In fact, did she talk about – did she do any baking, cooking or anything while you were there?
- A. No. No. [Tr 6/15/2010, p 262.]

See also petitioner’s redirect of Mr. Giesler: “Q. Did you actually see her make any pesto sauce? A. No.” *Id.*, p 272. On recross, respondent revisited this area and Mr. Giesler testified that no pesto was created in his presence, but that Mrs. Zarbo discussed it when he set up his appointment. *Id.*, pp 270- 280.

⁴ Tr, pp 262-263, 269-271.

⁵ Tr, pp 227-229.

precisely Mr. Giesler's testimony, at page 271 of the transcript:

A. . . . I felt that she needed someone to come in and help her with financial decisions.

Q. Okay. *Was it your opinion that Ms. Zarbo did not comprehend the nature and effect of the divorce action?*

A. Mr. Campbell: I'm going to – well, I'll just leave it.

THE WITNESS: *Yeah, I would say she didn't* because I don't know if it was a defense mechanism or everything was crumbling around her, but it seemed like her whole life was crumbling around her and all she cared about was cooking classes and stuff that most people wouldn't be relevant [sic] at that point. [Emphasis added.]

The hearing panel identified some of the bases for its MRPC 4.3 finding:

the totality of the evidence, including the description by witnesses Schieve and Giesler of the bizarre behavior of Mrs. Zarbo, the testimony of witness Sacks that Mrs. Zarbo did not know what she had signed and returned to attorney Stimpson, the medical report that was in the Respondent's possession, and the documents Respondent had drafted and left with Mrs. Zarbo to sign, including a sample Answer to Complaint for Divorce, Consent Judgment of Divorce, Waiver of Conflict of Interest, and the election to opt out of the services of the Friend of the Court, all lead to the reasonable conclusion that Mrs. Zarbo was confused with Respondent's role in this divorce proceeding. [May 3, 2011 Order Denying Respondent's Motion for Involuntary Dismissal and Denying Respondent's Motion for Reconsideration, pp 2-3.]

Respondent's arguments, including those discussed above, amount to an attempt to reargue the facts and an invitation to the Board to reweigh the evidence. We decline to do so. The record contains ample evidentiary support for the panel's findings regarding misconduct.

The Administrator's brief in support of his petition for review asserts that the facts establish various rule violations pled by the Administrator but not found by the panel. We are not persuaded that the panel erred in finding that the evidence failed to establish various alleged rule violations.

The Administrator also argues that discipline should be increased. In its report on discipline, the panel accepted the Administrator's position that the starting point for discipline here is a suspension under the two ABA Standards cited by the Administrator (Standards 6.32 and 7.2). However, observing that, under *Grievance Administrator v Lopatin*, 462 Mich 235; 612 NW2d 120 (2000), precedent plays a role in refining the Standards' recommendations, the panel noted the

absence of authorities cited by the Administrator and the citation of two consent reprimand cases by respondent. We find no error by the panel in applying the standards or in weighing the aggravating and mitigating factors here. However, we do not find that the two consent dispositions reflect the appropriate level of discipline for all cases of this type or amount to a considered decision to modify the presumptive level articulated by the Standards. Thus, in the exercise of our overview function to establish the appropriate level of discipline for specified misconduct, we conclude that, under all of the circumstances of this case, a reprimand is insufficient. Accordingly, we will order that the respondent be suspended from the practice of law in Michigan for 30 days, as the Administrator requested below.

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