STATE OF MICHIGAN

# Attorney Discipline Board



GRIEVANCE ADMINISTRATOR,
Attorney Grievance Commission,

Petitioner,

v Case No. 06-186-GA

SHELDON L. MILLER, P 17785,

Respondent.
_____/

## ORDER VACATING HEARING PANEL ORDER OF REPRIMAND

Issued by the Attorney Discipline Board
211 W. Fort St., Ste. 1410, Detroit, MI

Tri-County Hearing Panel #64 of the Attorney Discipline Board entered an order of reprimand in this matter on November 26, 2008. The complainants filed a timely petition for review. The respondent's delayed cross-petition for review was considered by the chairperson of the Attorney Discipline Board under the guidelines of MCR 7.205(F) and was granted in an order entered April 1, 2009. The Attorney Discipline Board has considered the petitions for review submitted by the complainants and the respondent and has conducted review proceedings in accordance with MCR 9.118, including review of the whole record and consideration of the briefs and arguments presented by the Grievance Administrator, the respondent and the complainants. For the reasons set forth below, the hearing panel's factual findings are affirmed. However, the order of reprimand is vacated for the reason that respondent's conduct during the relevant period 1984 through 1985 was not in violation the Michigan Rule of Professional Conduct (MRPC) 1.4(b), as alleged in the formal complaint. More specifically, MRPC 1.4(b) did not become effective until October 1, 1988 and the complaint in this case does not charge any violation under Michigan's former Code of Professional Responsibility.

The formal complaint filed in this matter arises from respondent's representation of Donald Durecki, Wayne Alarie, Richard Martin and James Dziadziola, four individuals who retained respondent in 1983-1984 to represent them in claims for compensation as members of the sales staff of the Auto Club of Michigan (AAA). The complaint alleged that respondent committed various acts or omissions in his representation of these four individuals over a 19 year period from approximately 1983 to 2002, in violation of specified provisions of Michigan Court Rule 9.104 and the Michigan Rules of Professional Conduct promulgated by the Supreme Court, effective October 1, 1988. Prior to that date, lawyer conduct in Michigan had been governed by the Michigan Code of Professional Responsibility, adopted in 1971.

In its report on misconduct, the hearing panel found that a majority of the charges of misconduct were not established by a preponderance of the evidence, but that the Grievance Administrator *had* proven that respondent failed to explain a matter to the extent reasonably

necessary to permit his clients to make informed decisions regarding the representation. The panel found:

> Specifically, although acting with good faith and arguably with the clients' best interests in mind, Respondent had the obligation of explaining in detail the ramifications of participating in a "large group" action versus initiating their actions independent of the group. In addition, Respondent had the obligation to advise his clients, prior to joining them in the group action, of the adverse ruling of Judge Hausner immediately prior to joining the group. By failing to provide that information, the new clients were deprived of the opportunity to file an independent action which likely would have been assigned to a different Judge where a different ruling on the dismissed legal issues might have occurred. [HP Report, 04/08/08, p 8]

The panel found that this conduct was, as charged in the complaint, a violation of Michigan Rule of Professional Conduct 1.4(d). This obligation identified by the panel, i.e., the obligation of explaining the ramifications of participation in a "large group" action and of advising complainants of an adverse ruling by Judge Hausner, occurred contemporaneously with respondent's addition of Complainants Alarie and Martin as plaintiffs in the pending action against AAA in May 1984 and the addition of Complainants Durecki and Dziadziola as plaintiffs in an amended complaint filed no later than 1986.

In reviewing the hearing panel's factual findings, the Board must determine whether those findings have proper evidentiary support in the whole record. See, e.g., *Grievance Administrator v T. Patrick Freydl*, 96-193-GA (ADB 1998). 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). *Grievance Administrator v Lopatin*, 462 Mich 235, 247-248 n12; 612 NW2d 120 (2000). In applying this standard of review, it is not the Board's function to determine whether there is evidentiary support for the allegations in the complaint or whether or not there is evidentiary support for the conclusions and interpretations argued on behalf of a party or complainant seeking review. Rather, the Board must determine whether or not there is support in the record for the hearing panel's findings. *Grievance Administrator v Julian M. Levant*, 91-222-GA (ADB 1993). Nor is it the Board's function to substitute its own judgement for that of the panel's 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). This is especially true when the panel has had an opportunity to make an assessment of the demeanor and credibility of the witnesses before it. *Grievance Administrator v Neil C. Szabo*, 96-228-GA (ADB 1998). See also *In Re McWhorter*, 449 Mich 130, 136 n7 (1995).

Applying the applicable standard of review in this case, we conclude that the panel's determination that certain charges in the complaint were not supported by a preponderance of the evidence must be affirmed.

Similarly, there is evidentiary support for the hearing panel's factual conclusion that respondent added these complainants to the existing "large group" lawsuit in the period 1984-1985 without first explaining in detail the ramifications of their participation in that group action versus initiating their own, independent action and without advising his clients of the adverse ruling by Judge Hausner. However, we cannot sustain the hearing panel's findings that respondent's acts or omissions in 1984 and 1985 were in violation of MRPC 1.4(a) for the simple and inescapable

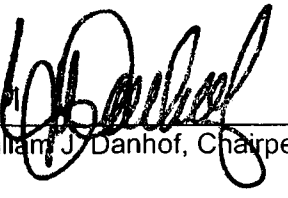
reason that MRPC 1.4(a) and, indeed, the entire Michigan Rules of Professional Conduct, were not adopted by the Supreme Court until October 1, 1988.

Respondent has presented a simple argument on review: respondent cannot be disciplined for violating MRPC 1.4(b) for conduct which occurred prior to 1988 because MRPC 1.4(b) did not exist when the conduct occurred. Moreover, unlike other provisions in the Rules of Professional Conduct adopted in 1988 which are substantially similar to the corresponding provisions of the former Code of Professional Responsibility, MRPC 1.4(b) did not have a counterpart in the pre-1988 Code dealing specifically with a duty to provide adequate communication to a client. It is argued that although an explicit duty of adequate communication with a client was not present in the pre-1988 Code of Professional Responsibility, such a duty was considered to be an element of a lawyer's duty to represent a client competently under Canon 6 and the duty to represent a client zealously under Canon 7 of the Code. However, this argument is unavailing in this case because violations under those Canons were not charged.

NOW THEREFORE,

**IT IS ORDERED** that the hearing panel order of reprimand entered November 26, 2008 is **REVERSED** and the formal complaint in Case No. 06-186-GA is **DISMISSED**.

ATTORNEY DISCIPLINE BOARD

By: 

William J. Danhof, Chairperson

DATED: October 30, 2009

Board members William J. Danhof, William L. Matthews, C.P.A., Andrea L. Solak, Rosalind E. Griffin, M.D., Carl E. Ver Beek and Craig H. Lubben concur in this decision.

Board member Thomas G. Kienbaum and James M. Cameron, Jr. were recused and did not participate.