STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellant,

v

David G. Gorcyca, P 41352,

Respondent/Appellee,

Case No. 08-37-GA

Decided: October 30, 2009

Appearances:

Robert E. Edick, for Grievance Administrator, Petitioner/Appellant
David F. DuMouchel, for the Respondent/Appellee

BOARD OPINION

The formal complaint in this matter alleges that respondent, the Oakland County Prosecutor, made various statements to the media in connection with the prosecution of James N. Perry for criminal sexual conduct, and that these statements violated MRPC 3.6 which states:

> A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

Tri-County Hearing Panel #27 entered an order and report granting summary disposition pursuant to MCR 2.116(C)(10) and dismissing the formal complaint. The Grievance Administrator petitioned for review and the Attorney Discipline Board has conducted review proceedings in accordance with MCR 9.118. This Board reviews *de novo* a hearing panel's ruling on a motion for summary disposition to determine whether the moving party was entitled to judgment as a matter of law. *Grievance Administrator v Bruce J. Sage,* 96-35-GA (ADB 1997); *Cf. Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

After careful consideration, we are not persuaded that summary disposition is appropriate in this matter. While it is true that the timing of a lawyer's statements is one relevant factor in

determining whether that lawyer has violated MRPC 3.6, and it is also true that the standard set forth in that rule is an objective one, we cannot agree at this stage that, as a matter of law, "no objective person could conclude that the statements had a substantial likelihood of materially prejudicing Perry's retrial." (HP Report, p 8.)

It is important to make the assessments called for in Rule 3.6 without effectively requiring a demonstration that the statements caused actual prejudice and without giving undue weight to presumptions about the passage of time and its possible effect on the proceedings.[1] While a panel applying MRPC 3.6 is not required to "stop the clock" immediately following the statements at issue and disregard all subsequent events, such events do not immunize extrajudicial statements if they are covered by the rule. As our Court has noted, the plain language of MRPC 3.6 requires a showing of substantial likelihood of prejudice.[2] This test, along with the rule's other requirement that a reasonable person might expect dissemination, clearly demonstrates that the rule requires a forecast – even when subsequent events are uncertain. The rule is designed to *prevent* harm such as interference with adjudication according to the rules of evidence by tainting the pool of potential jurors. A lawyer may still be in violation of the rule even if events unfold in a manner such that this prejudice does not in fact occur or cannot be proven.[3] Also, a lawyer's good faith subjective belief that prejudice probably will not occur may be unreasonable and thus afford no defense under MRPC 3.6.[4]

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[1] *See, e.g., Maldonado v Ford Motor Co*, 476 Mich 372, 402; 719 NW2d 809 (2006) (actual prejudice is not required by MRPC 3.6 and could be impossible to prove years after the statement was made), and *US v Koubriti*, 305 F Supp 2d 723, 745 (ED Mich, 2003). In *Koubriti*, the court admonished the Attorney General for statements made on October 31, 2001 (and others made later) which related to a trial that commenced in March, 2003. 305 F Supp 2d at 727 n 3. The court's discussion included considerations related to rules of professional conduct and disciplinary proceedings as well as the "gag order" upon which the court's sanction was based. The court's order was patterned on a predecessor to MRPC 3.6. A sanction was imposed for the October 31, 2001 statement "[a]lthough it appeared that this statement had been forgotten by the time of trial, and although the extensive *voir dire* revealed no actual prejudice to Defendant's right to a fair trial." 305 F Supp 2d at 745.

[2] *Maldonado,* n 1 *supra.*

[3] See, e.g., 2 Hazard, Hodes & Jarvis, *The Law of Lawyering* (3rd ed), §32.5, Illustration 32-1, p 32-11 (reporter withholds publication of statements until after trial).

[4] *Grievance Administrator v Riley*, 94-185-GA (ADB 1997) (respondent's familiarity with the publication schedule of weekly paper and his experience with juries led him to believe, erroneously, that the jury's deliberations would be concluded by the time his statements appeared in print).

In this case, for example, a new trial had not been granted when some of the statements, referring to inadmissible evidence, were made. Another statement, a press release referring to the accused's refusal to take a polygraph examination, was made the day the new trial had been ordered. Respondent appealed the order and not until 13 months later did the trial commence. We do not believe that the absence of a firm or imminent trial date renders the rule inapplicable, nor do we suggest that the panel believes this. Indeed, on a related point, the panel disclaimed a holding that there is a specific period of time after which statements alleged to be in violation of MRPC 3.6 are "time-barred." We agree. Numerous factors may be relevant, such as the intensity of media coverage at the time statements are made, the reasonable likelihood that coverage or dissemination would continue, the likelihood that the statements would or would not fade from memory, whether the statements would likely be revived in print or be available electronically, and the nature and prejudicial quality of the statements themselves (some statements may be so prejudicial that they could be more likely to prejudice a distant future proceeding than less prejudicial statements made closer to a trial). This is by no means an exhaustive list of the relevant considerations in applying MRPC 3.6 or any component thereof.

In conclusion, and as stated above, we do not agree that there is no genuine issue of material fact as to whether respondent reasonably should have known that the statements had a substantial likelihood of materially prejudicing an adjudicative proceeding, or that respondent is entitled to judgment as a matter of law. Although a reasonable lawyer in respondent's shoes at the time he made his statements would have been faced with contingencies and uncertainty as to future events (such as whether or when a new trial might occur), we cannot conclude that it is impossible for the Administrator to develop a record establishing a violation of MRPC 3.6. Accordingly, we will vacate the order of dismissal and remand this matter for hearing.

Finally, we wish to acknowledge that our deliberations have been assisted by the advocacy of counsel for both parties in this review proceeding as well as the capable and thoughtful work of the hearing panel below.

Board members William J. Danhof, Thomas G. Kienbaum, Andrea L. Solak, Carl E. Ver Beek, Craig H. Lubben and James M. Cameron, Jr., concur in this decision.

Board Member William L. Matthews, C.P.A., was recused. Board Members Rosalind E. Griffin, M.D., and Sylvia P. Whitmer, Ph.D., did not participate.