STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellant,

v

David W. Potts, P 19043,

Respondent/Appellee,

Case No. 03-61-GA

Decided: September 28, 2005

Appearances:

Robert E. Edick, for the Attorney Grievance Commission
Frances A. Rosinski, for the Attorney Grievance Commission
Marcia L. Proctor, for the respondent
David F. DuMouchel, for the respondent

BOARD OPINION

On September 15, 2004, Tri-County Hearing Panel #63 filed its opinion and order granting the respondent's second motion for summary disposition and dismissing the formal complaint filed May 2, 2003. The Attorney Discipline Board has conducted review proceedings in accordance with MCR 9.118 to consider the petition for review filed by the Grievance Administrator. For the reasons discussed below, we affirm the hearing panel's decision to dismiss the formal complaint.

I. Background

Both the underlying facts and the procedural history in this case are set forth in detail in the hearing panel's September 15, 2004 opinion and order attached as Appendix A.

Respondent, David Potts, a lawyer in Michigan since 1969, joined the Butzel Long law firm in February 1999. In 1999, he was approached by a lobbyist for the Michigan Association of Counties (MAC) with whom he was already acquainted about conducting a research project regarding the delivery of services to the elderly in Michigan. The project was to result in preparation of a position paper that MAC could review. Specifically, it was envisioned that the

paper would deal with the current funding system based upon regional Area Agencies on Aging (AAA) and would include recommendations for changes in the current system.

It is undisputed that the respondent initiated a conflict check according to the procedures, as he understood them, then in place at Butzel Long. The conflict check was undertaken by the firm's general counsel, Marcia Proctor.[1] It is undisputed that her initial conflict check identified Area Agency on Aging 1B (AAA 1-B) as an existing client of Butzel Long. Specifically, the firm's computerized system disclosed that AAA 1-B had become a Butzel Long client in March 1998 when attorney Gary Klotz joined the firm. Before joining Butzel Long, Mr. Klotz had provided employment relations and employment law counseling to AAA 1-B and he continued to provide employment-related counseling to AAA 1-B after he joined the firm. There are no facts that show that Mr. Klotz or anyone else at Butzel Long had been consulted by AAA 1-B on legal issues specifically relating to that agency's funding.

Ms. Proctor prepared a 217 page conflict check report which included her conclusion that the firm's occasional advice to AAA 1-B on employment-related matters did not present a conflict of interest which would prevent another member of the firm from advising MAC on the broad, but unrelated, issue of funding and delivery of services under the current system of area agencies.

A draft report prepared by respondent and the Butzel Long firm was presented to MAC in late March 2000. The draft report made certain criticisms of the AAA system generally and mentioned AAA 1-B specifically. In the final report, the specific references to AAA 1-B were removed. The hearing panel found that the report was ultimately acted upon by MAC, with results which were arguably to the detriment of AAA 1-B.

In approximately June 2001, a request for investigation was filed with the Attorney Grievance Commission by, or on behalf of, AAA 1-B against respondent Potts. The formal complaint ultimately filed on May 2, 2003, is based primarily upon the Grievance Administrator's charge that the respondent violated MRPC 1.7(a) which states:

> (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
>
> > (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the

[1] Ms. Proctor is a former general counsel to the State Bar of Michigan and is a former executive director of the American Bar Association's Center for Professional Responsibility.

> other client; and
> (2) each client consents after consultation.

It is undisputed in this case that AAA 1-B was not consulted about the firm's contemplated representation of MAC. While other issues were raised and addressed during this proceeding, the principle issue identified by the panel was whether, in fact, the service provided to Butzel client MAC in the form of a paper on the funding of Area Agencies on Aging in Michigan was "directly adverse" to the interest of Butzel client AAA 1-B within the meaning of MRPC 1.7(a).

The formal complaint in this case was filed May 2, 2003. In his timely answer, the respondent admitted several salient points in the complaint, namely, that AAA 1-B was a client of Butzel Long when respondent Potts was asked to undertake representation for MAC. The answer clarified that AAA 1-B was a client only in employment-related matters involving such issues as the Family Leave Act, the American's with Disabilities Act and wage issues. Noting that AAA 1-B had not become a client of the firm until attorney Klotz joined Butzel Long, respondent disclosed that from 1998 to mid-2000, Butzel Long performed a total of 38 hours of work for AAA 1-B and was performing no services for AAA 1-B at the time the firm ran a conflict check at respondent's behest.

During the following months, both parties filed pleadings related not only to the respondent's motion for summary disposition, but on such issues as whether or not Ms. Proctor was or was not a "supervisory lawyer" at Butzel Long within the meaning of MRPC 5.2(b); whether Ms. Proctor could continue as co-counsel for respondent in the discipline proceeding and whether or not witnesses should be sequestered at an eventual hearing.

On December 11, 2003, the hearing panel issued an order dealing with a number of these issues. The respondent's motion for summary disposition was taken under advisement but the panel's order directed the parties to produce documents, including billing records, focusing on Butzel Long's representation of AAA 1-B during the period of March 1998 through April 2000. This information was provided and on January 9, 2004, the panel issued an order denying the respondent's motion for summary disposition, without prejudice. A pretrial hearing was then scheduled for February 18, 2004.

At that hearing, panel chairperson Googasian proposed to the parties:

> What we're going to ask you to consider is we would like to have an initial limited evidentiary hearing relative to the particulars of MRPC 1.7(a) and (b) particularly in relation to whether the representation by Butzel Long was 'directly adverse to another client' but also as to

> whether that representation of one client was materially limited by the responsibility to another client. [Tr 02/18/04, p 3.]

The chairperson announced that the panel wanted the testimony of the four individuals whom the panelists felt could shed light on that issue: respondent David Potts; Butzel Long counsel Marcia Proctor; Sandra Reminga, the executive director of complainant AAA 1-B; and Gary Klotz, the Butzel attorney who was primarily responsible for AAA 1-B's employment law work by the firm. Mr. Googasian stressed that the panel was seeking the agreement of the parties before undertaking such a hearing:

> I don't know that we want to do anything by way of a limited hearing without the agreement of the parties, so we want you to - and we may take a break if you want or you may ask questions if you want - but we want you to agree to that. Otherwise we'll have to deal with this in another way. [Tr 02/18/04, p 4.]

The Administrator's counsel immediately agreed to such a hearing:

> Ms. Rosinski: If I may, I was taking notes just before you came in and quite honestly, other than this expert issue, this is all the testimony that I really thought was necessary . . . I believe that the Grievance Administrator would totally support the use of a limited evidentiary hearing at this point. [Tr 02/18/04, pp 4-5.]

After some consultation, the respondent also agreed to such a hearing. The parties and the panel agreed to hold a limited evidentiary hearing at the chairperson's office at 5:00 p.m. on March 8, 2004.

Notwithstanding the earlier consent by counsel for both parties to conduct a "limited evidentiary hearing," the Grievance Administrator's counsel expressed some misgivings to the panel during the hearing on March 8, 2004 concerning the nature and scope of that hearing. For example, the Administrator's counsel stated to the panel:

> I don't even know what's been on the record and what's not, but I do have to say any stipulation that I made on behalf of the Grievance Administrator to this hearing was under a misapprehension as to the nature of this hearing.
>
> The Grievance Administrator believes that we are going forward with the misconduct hearing and part of that is I am now taking testimony. I am now revealing whatever trial strategy I may have. Whatever questions I have been holding are now going to be revealed in this evidentiary hearing, the purpose of which it sounds like is going to allow the parties to have now available to them sworn testimony to

> renew their motion for summary disposition, which is sworn testimony they did not have at the time they filed their motion for summary disposition.
>
> That is not what our understanding of this hearing was. If we go to a full hearing, there will be no trial strategy. It will have gone away, because whatever questions that we ask today, they are going to be allowed to be re-asked in a full hearing. So I need to make that note on the record that if we are going to go forward this evening, you know I am here and I did not understand the nature of this hearing.
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> Chairperson Googasian: Well, I think the nature of the hearing was clearly spelled out in the February 18th order, and I am giving you now the opportunity to present whatever testimony you want to present on whether the respondent accepted representation that was directly adverse to AAA 1-B. [Tr 03/08/04, pp 66-67.]

During the course of the hearing, which concluded at 10:30 p.m. that evening, the panel's chairperson made it clear that the panel would not be making any definitive rulings that evening but that the panel would rule on any additional motions which might be filed by either party:

> If and when additional motions are filed, then whatever pleadings, affidavits, testimony from hear, from this hearing, or anything up to this hearing will be part of the record for such a motion. [Tr 03/08/04, p 61.]

On April 28, 2004, the respondent filed a second motion for summary disposition. On September 15, 2004, the hearing panel granted summary disposition in the opinion and order which is the subject of this review proceeding. In its opinion, the panel rejected the respondent's claim that the complaint failed to state a claim of misconduct and it denied the respondent's motion for dismissal under MCR 2.116(C)(8). The panel also rejected the respondent's claim that his conduct was protected under MRPC 5.2 which reads:

> (b) A subordinate lawyer does not violate the rules of professional conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

The panel found that Butzel Long counsel Marcia Proctor was not a supervising attorney, nor was Potts a subordinate lawyer within the meaning of that rule. The panel concluded that while Ms. Proctor, on behalf of the firm, advised respondent that the firm could undertake new representation, the ultimate decision as to whether respondent should accept the representation of MAC rested with respondent. "MRPC 5.2 should not be read to protect the attorney who has at all

times had the ability to ultimately choose to accept or not accept the representation." (HP Opinion and Order 09/15/04, p 9).

In its opinion and order, the panel determined that there were no genuine issues of material fact. In confronting the question of whether the interests of AAA 1-B and MAC were directly adverse, the panel reviewed the nature and scope of Butzel's representation of AAA 1-B from 1998 to 2000; the nature of the report requested by MAC; respondent's preparation of such a report from January 2000 to March 28, 2000; and respondent's utilization of the Butzel Long conflict check system.

In reviewing the facts established by the record, the panel cited the official comment to MRPC 1.7, which provides:

> Conflicts of interest in context other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for adverse effect include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise and the likely prejudice to the client from the conflict if it does arise. The question is often on of proximity and degree.

Applying those factors in its analysis, the hearing panel found that Butzel Long had represented AAA 1-B for less than two years in employment related matters and was not involved with, or had confidential information regarding, the funding mechanisms or services performed by AAA 1-B. Similarly, the panel found that the report requested by MAC did not deal with employment or labor law issues involving AAA 1-B or any of the other area agencies. The panel found that the future impact of the MAC report prepared by respondent on AAA 1-B was "speculative" and that the potential prejudice to AAA 1-B was "minimal." The hearing panel concluded that respondent Potts' representation of MAC was not "directly adverse" to Butzel client AAA 1-B within the meaning of MRPC 1.7 at the time of his retention, during or after the dissemination of his draft report, or at any time subsequent.

II. The Grievance Administrator's Petition for Review

The Grievance Administrator's petition for review states simply that the hearing panel "erred by granting respondent's motion for summary disposition." In his supporting brief, however, the Administrator identifies the following issues to be considered by the Board.

1. Was the panel procedure in this case fatally flawed when the hearing panel conducted a "limited evidentiary hearing?"

2. Although the Administrator's counsel explicitly stipulated in advance to such a hearing, did counsel have legal authority to stipulate to such a procedure and/or did the hearing exceed the scope of the stipulation?

3. Did the hearing panel improperly consider opinion letters submitted by both parties from legal experts?

4. Did the respondent have a non-delegable duty to personally resolve the conflict of interest issue?

The Grievance Administrator seeks reversal of the hearing panel's opinion and order; reinstatement of the formal complaint; and reassignment of the complaint to a new hearing panel for hearing in accordance with MCR 9.115.

III. Discussion

Before turning to the issues identified by the Grievance Administrator in this review proceeding, we note that it is our duty under the court rules pertaining to civil and disciplinary procedure to inquire whether alleged errors occurring below are prejudicial or inconsistent with substantial justice. MCR 2.613(A); MCR 9.107(A). We also note that the Grievance Administrator's petition for review does not argue explicitly that the hearing panel erred in its ultimate conclusion that the interests of Butzel client AAA 1-B had not been shown to be "directly adverse" to the interests of the client MAC within the meaning of MRPC 1.7. The Administrator has instead focused primarily on the procedure utilized by the hearing panel, particularly its use of what it described as a "limited evidentiary hearing."

Nor does the Grievance Administrator's brief address the questions of whether the panel's conclusion that misconduct was not established was wrong and, if so, why it was wrong.[2] If the procedure utilized by the hearing panel in reaching its legal conclusion was fatally flawed to the extent argued by the Administrator, reversal and remand might be an appropriate result, even if the Board agreed with the panel's ultimate conclusion. However, that is not the situation presented here. We are not persuaded that the panel's procedures were fundamentally flawed - certainly not to the extent argued by the Administrator. Moreover, we believe that the panel reached the right result.

A. The "Limited Evidentiary Hearing"

The respondent's argument that the hearing panel's utilization of a limited evidentiary

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[2] By contrast, the respondent's brief argues persuasively at pages 16-20 that the hearing panel did, indeed, reach the right result by properly applying relevant factors distilled from the official comment to MRPC 1.7.

hearing constituted reversible error is inextricably intertwined with the Administrator's second argument that the claimed impropriety of that hearing could not be excused or waived by the Grievance Administrator's stipulation. However, we will address them separately.

Although it is argued that the hearing panel improperly utilized an evidentiary hearing to decide a motion for summary disposition pursuant to MCR 2.116(C)(10), there was, in fact, no such motion pending before the panel when it conducted the hearing which is now challenged. The panel had denied the respondent's first motion for summary disposition in an order entered January 9, 2004. There was no motion for summary disposition pending when the parties agreed in February 2004 to a limited evidentiary hearing or when that hearing was conducted in March 2004. We do not agree with the Grievance Administrator that the panel sidestepped its responsibility "by resorting to a so-called evidentiary hearing and thereafter inviting the previously unsuccessful movant to renew his motion for summary disposition." (Grievance Administrator's Brief, p 3). Unquestionably, the panel's chairperson closed the March 8, 2004 hearing with his statement that, if and when additional motions were filed, the panel would consider "whatever pleadings, affidavits, testimony from this hearing, or anything up to this hearing" as part of the record for such a motion. We are not willing to draw the inference suggested by the Administrator, however, that the panel consciously sought to avoid its responsibility by laying the groundwork for a second summary disposition motion.

The respondent's second motion for summary disposition under MCR 2.116(C)(10) was filed on April 28, 2004. The respondent argued that there was no genuine issue of material fact as to the nature of the representation by the Butzel firm for clients AAA 1-B and MAC and that the panel could, and should, rule that, as a matter of law, the "directly adverse" relationship required under MRPC 1.7(a) could not be established. When responding to a motion for summary disposition under MCR 2.116(C)(10), a party may not rest upon the mere allegations or denials in his or her pleadings, but must, by affidavits or other documentary evidence, set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not present documentary evidence establishing the existence of material factual issue, the motion should be granted. See MCR 2.116(G)(4). Where the burden of proof at trial on a dispositive issue rests on a non-moving party, the non-moving party may not rely on mere allegations or denials in pleadings, but most go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. Smith v Globe Life Insurance Company, 460 Mich 446 (1999).

In this case, the Grievance Administrator, the non-moving party in a motion for summary disposition before the panel, had the burden of showing that the interests of Butzel clients AAA 1-B and MAC were directly adverse within the meaning of MRPC 1.7(a). Despite repeated assertions that such adversity existed, the Administrator has not, in our opinion, been able to point to specific facts supporting that conclusion in either his response to the motion for summary disposition or his argument to the Board on review. This is particularly true with regard to the insinuation by the Administrator's counsel that respondent Potts was retained by MAC to further MAC's goal of destroying the Area Agencies on Aging, including Butzel client AAA 1-B.[3] This argument, that the ultimate goal of MAC, at the time it retained the respondent to write a position paper, was to have AAA 1-B dismantled, was repeated at the review hearing before the Board.[4]

Unsupported assertions that MAC's goal was the dismantling of AAA 1-B notwithstanding, the plain language of Butzel Long's retention letter with MAC and respondent's report on MAC's behalf do not provide an adequate basis for such characterizations. In making its determination that there was no genuine issue of material fact, the panel concluded that respondent was hired by MAC for the purposes spelled out in the retention letter and that those purposes could be divined by simply reading the letter. Whether considered by the hearing panel at a limited evidentiary hearing stipulated to by the parties, or at a subsequent evidentiary hearing, the retention letter would speak for itself. Similarly, the nature and scope of the services performed by Butzel Long for AAA 1-B in labor and employment matters was fully set forth in the Butzel Long billing records and the testimony of Ms. Reminga and Mr. Klotz. The Administrator does not seriously contend, by affidavit or otherwise, that there is a genuine, material, dispute as to those services performed for AAA 1-B.

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[3] In cross examining Butzel general counsel Marcia Proctor at the evidentiary hearing on March 8, 2004, the Administrator's counsel and Ms. Proctor had this exchange:

> Ms. Proctor: If it is true that AAA 1-B and MAC have politically diverse views, that does not affect the conflict analysis. That is not cognizable under the ethics rules.
>
> Q: So if one entity, one client seeks to literally destroy the reconfiguration, the very existence of another client, that's not a conflict? That's not directly adverse?
>
> A: That was not the scope of our proposed representation of MAC. [Tr 03/08/04, p 151.]

[4] Review Hearing Tr 03/17/05 pp 23-24.

B. The Grievance Administrator's Stipulation to Conduct the Limited Evidentiary Hearing.

As shown in the quoted portions of the transcript from the panel hearing on February 18, 2004, the panel chairman Googasian insisted that the panel would not undertake a limited hearing without the specific agreement of the parties. The Grievance Administrator's counsel immediately and enthusiastically stated that the Administrator "would totally support the use of a limited evidentiary hearing at this point." (Tr 02/18/04, p 5). Furthermore, after the chairperson announced that the panel wished to hear from respondent David Potts; Butzel Long counsel Marcia Proctor; AAA 1-B Executive Director Sandra Reminga; and Butzel Long attorney Gary Klotz, the Administrator's counsel observed that, "quite honestly, other than this expert issue, this is all the testimony that I really thought was necessary . . ." (Tr 02/18/04, p 4).

A stipulation is an agreement, admission or concession made in a judicial proceeding by the parties; its purpose generally is to avoid delay, trouble and expense. Eaton County Road Commissioners v Schultz, 205 Mich App 371; 521 NW2d 847 (1994). At the hearing on February 14, 2004, the parties and the panelists were clearly in agreement that further trouble, delay and expense in this highly-contested proceeding could potentially be avoided by conducting the limited evidentiary hearing proposed by the panel. It is generally understood that a party may not stipulate to a matter and then argue on appeal that the resultant action was error. Chapdelaine v Sochocki, 247 Mich App 167, 174; 235 NW2d 339 (2001); Phinney v Perlmutter, 222 Mich App 513; 564 NW2d 532 (1997); Farm Credit Services of Michigan's Heartland v Weldon, 232 Mich App 662; 591 NW2d 438 (1998).

While the Administrator now argues that the gap between what the hearing panel advertised on February18th and what it actually delivered on March 8th "is too great to legitimize by petitioner's [Administrator's] stipulation," we note that the panel followed its February 18, 2004 discussion with the parties with a written order on February 23, 2004 which clearly spelled out the scope of the stipulated hearing:

> By stipulation of the attorneys for petitioner and respondent it is ordered that an evidentiary hearing be conducted to determine the following:
>
> 1. The extent, and scope, of Butzel Long's representation of AAA1-B.
> 2. Whether respondent accepted representation

that was directly adverse to AAA 1-B.

3. Whether respondent accepted representation that would materially limit Butzel Long's responsibilities to another client.
4. What procedures were adopted by Butzel Long to determine the parties and issued involved and to determine whether there were actual or potential conflicts of interest.

[HP Order 02/23/04.]

After identifying the witnesses expected to be called, the panel's order then pointedly announced that:

> Following the evidentiary hearing, the hearing panel will make findings of fact and enter an appropriate order. [Id p 2.] [Emphasis added.]

In light of the clear language of that order (which was not appealed or objected to by either party), it is difficult to see how the Administrator can now attack the panel's decision, not on the result reached, but because it is "riddled with fact finding." (Administrator's Brief 11/03/04, p 4). Rather than pulling a bait and switch as the Administrator suggests, the panel did exactly what it told the parties it would do by conducting an evidentiary hearing on the issues presented in the complaint. Neither party should have been surprised that the panel proceeded with the evidentiary hearing discussed and approved in advance.

We also find the respondent's arguments to be more persuasive than the Administrator's on the question of whether the panel's use of a limited evidentiary hearing was permissible under the Michigan Court Rules.[5] We are not persuaded that the procedure utilized by the hearing panel with the advanced approval of the parties was so clearly improper as to require reversal and remand.

C. Did the Hearing Panel Improperly Consider Unsworn Opinion Letters from Legal Experts?

In his brief in support of petition for review, the Administrator argues:

> Respondent's counsel attached several opinion letters from legal ethics experts to his client's answer to the formal complaint as well as to both of his motions for summary disposition. The hearing panel acknowledged in its decision that it had 'considered' these opinions. (Op p 3). This was error for two reasons.

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[5] Except as otherwise provided in Chapter 9.100, the rules governing practice and procedure in a non-jury civil action apply to a discipline proceeding before a hearing panel, MCR 9.115(A).

The respondent's answer to the formal complaint was filed May 27, 2003. On June 4, 2003, the Administrator filed a motion in limine to exclude respondent's proposed expert testimony. However, that motion simply sought an advance ruling that expert testimony would not be allowed at trial. The Administrator did not claim then, as he does now, that the mere presence of opinion letters in the record amounts to reversible error. Following briefing and arguments on the issue, the panel issued its order on September 23, 2003, stating:

> We unanimously rule that expert testimony, by affidavit or by trial testimony, will be allowed in this matter as provided under the court rules, and subject to the limitations articulated by the panel on the record at the pre-trial. [HP Order 09/23/03.][6]

The respondent filed his first motion for summary on October 3, 2003. The attachments to that motion included ten "expert reports."[7]

The Grievance Administrator filed an answer to the motion for summary disposition on November 17, 2003. Its attachments included an opinion letter from Michigan attorney John F. Burns opining that respondent violated MRPC 1.7.[8] The Administrator also attached a letter from the respondent's expert, Geoffrey Hazard, written in response to the Administrator's request that he

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[6] The limitations referred to in the order included a statement that, at an evidentiary hearing, the panel would rule on experts as they were presented, depending on what issue they were presented on, if they were cumulative, etc. The panel announced that it would follow the appropriate court rule in regard to a summary disposition motion and that parties could file affidavits to support facts in such a motion.

[7] The respondent marshaled letters from two non-Michigan lawyers and eight Michigan lawyers. The first group consisted of Lawrence J. Fox, Drinker, Biddle & Reath, LLP, Philadelphia, a speaker and author in the field of legal ethics and a former chair of the ABA Standard Committee on Ethics and Professional Responsibility and Geoffrey C. Hazard, Jr., Professor of Law at the University of Pennsylvania Law School and author of a number of legal treatises including The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct (2dEd 1990 with William Hodes). From Michigan, opinions were presented from Professor Lawrence A. Dubin of the University of Detroit Mercy Law School (a former chairperson of the Attorney Grievance Commission and co-author of the Institute of Continuing Legal Education's Michigan Rules of Professional Conduct and Disciplinary Procedure); Charles W. Borgsdorf, Hooper, Hathaway, Price, Beuche & Wallace, P.C., Ann Arbor; Jon R. Muth, Miller, Johnson, Snell & Cummiskey, PLC., Grand Rapids; Michael H. Hartmann, Miller, Canfield, Paddock and Stone, PLC, Detroit; Miles A. Hurwitz, Hurwitz, Karp & Gantz, P.C., Dearborn Heights (former chairperson of the Attorney Discipline Board and former chair of the State Bar of Michigan's Committee on Professional and Judicial Ethics); Nancy A. Wonch, Associate Professor, Thomas M. Cooley Law School, Lansing (former member of the Attorney Discipline Board and former chair of the State Bar of Michigan's Committee on Professional and Judicial Ethics); and Angus G. Goetz, Jr., Bloomfield Hills (former chairperson of the Attorney Grievance Commission, and former chairperson of the State Bar of Michigan's Committee on Professional and Judicial Ethics).

[8] Mr. Burns is Of Counsel to Williams, Mullin, Clark & Dobbins and is a former chairperson of the Attorney Discipline Board.

give further consideration to the ethical issues presented by respondent's conduct. Thus, it appears that the Administrator's response to the respondent's attachment of expert opinion letters to the motion for summary disposition was not a motion to strike or a motion for other relief, but was to attach to his reply an expert opinion letter which reached a different conclusion.

Just as we are skeptical that the hearing panel's limited evidentiary hearing, stipulated to by both parties, constitutes sufficient grounds to invalidate the panel's ultimate decision, we are equally skeptical of the Administrator's argument on appeal that the submission to the panel of expert opinion letters by both parties constitutes "reversible error."

The Administrator's argument that the panel acknowledged in its decision that it had "considered" the opinion letters submitted by the respondent should also be placed in context. Rather than singling out the respondent's opinion letters, the portion of the panel's opinion and order cited by the Administrator stated in full:

> The parties have presented to the Panel an extensive factual record in this matter. In addition to the evidence taken at the March 8, 2004 limited evidentiary hearing, the parties have provided the panel with numerous exhibits, recorded witness statements, and opinions of experts. The panel has considered all the information provided to it as part of the record on the summary disposition motion. [HP Opinion and Order 09/15/04, p 3.]

As the respondent has pointed out, the panel's opinion itself does not rely on, discuss or mention any of the reports from respondent's experts. The only expert opinion discussed by the panel in its report is that of the Grievance Administrator's expert, John Burns. Noting that the Administrator's expert had opined that respondent's representation of MAC could ultimately result in a decision by a third party that could negatively impact funding to AAA 1-B that would then possibly impact AAA 1-B's work force [the subject matter of Butzel Long's legal services for AAA 1-B], the panel wrote:

> This argument is so attenuated that it actually illustrates how many steps removed Butzel Long's representation of AAA 1-B was on financial issues. In fact, this argument seems to fall squarely within the language in the comment to MRPC 1.7 that representation of clients with adverse economic interests is not a "directly adverse" representation. [HP Opinion and Order 09/15/04, p 13.]

The Administrator's assertion that the mere presence of opinion letters, including one submitted by the Administrator himself, constitutes reversible error, is not supported by legal

authority and that argument must be rejected. It has not been shown that the hearing panel relied upon expert opinions in reaching its decision. Moreover, we believe that the hearing panel's analysis under MRPC 1.7 was correct even if those opinions are now excluded from the record.

D. The Issue of Respondent's Duty to Personally Resolve the Conflict of Interest Question.

In the fourth and final section of his brief in support of petition for review, the Administrator argues that the hearing panel overlooked respondent's admissions, both in his testimony and in his answer to the complaint, that he did not personally conduct a conflicts check prior to undertaking the position paper project for MAC. Rather, following the procedure in his firm, he relied on Butzel Long's general counsel to conduct a conflicts check. It is not entirely clear why this issue has been presented to the Board on review.

In its opinion and order, the hearing panel specifically considered the question of whether the respondent was a lawyer subordinate to Butzel Long general counsel Marcia Proctor within the meaning of MRPC 5.2 which reads in part:

> (b) a subordinate lawyer does not violate the rules of professional conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question or professional duty.

The panel unequivocally refused to accept that Ms. Proctor was a supervising attorney in this case. The panel said:

> Simply put, Ms. Proctor did not force respondent to accept the representation of MAC. She simply advised him that the firm could undertake the matter from a professional liability standpoint. (Tr 03/08/04, p 137, ln 12-16.) The ultimate decision on whether to accept the representation of MAC rested with respondent at all times. [HP Opinion and Order, pp 8-9]; [First emphasis in original; second emphasis added.]

That statement in the panel's report would seem to be enough to make this issue moot; that is, the Administrator and the hearing panel apparently agree that no matter what conclusion Ms. Proctor reached in submitting her conflict opinion, the ultimate decision to take on MAC as a client was made by respondent Potts and he could be subject to a finding of misconduct if that new representation did, in fact, violate MRPC 1.7. However, the Administrator has taken one very large step further in his brief:

> By taking an obligation personal to himself and delegating it to his law firm's general counsel, respondent violated MRPC 1.7 and

> 8.4(a), as well as MCR 9.102(A)(3). [GA's Brief in Support of Petition for Review, p 18.]

The formal complaint filed in this matter on May 2, 2003 does not charge that the respondent committed misconduct by delegating the responsibility for a conflicts check to his firm's general counsel nor does it charge a violation of MCR 9.102(A)(3). It is not clear to us why the Administrator is now leveling a new charge of professional misconduct against the respondent which was not charged in the complaint.

By flatly asserting that respondent Potts violated the Rules of Professional Conduct and the Michigan Court Rules by delegating a conflicts check to his law firm's general counsel, the Grievance Administrator is apparently issuing a warning to all Michigan attorneys that the act of delegating a conflicts check to a law firm's general counsel or any other lawyer in the firm, is, in and of itself, an act of professional misconduct.[9] We strongly disagree.

The comment to MRPC 1.7 states, "Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation." However, that comment also states,

> The lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters, the parties and issues involved and to determine whether there are actual or potential conflicts of interest.

The reality of modern legal practice, especially for relatively large firms with multiple business or institutional clients, simply does not allow every lawyer in every law firm to personally conduct a conflict check in every case.

While the Grievance Administrator may disagree with the advice given to respondent by his firm's general counsel, there has been no suggestion in this case that Butzel Long failed to use reasonable procedures, appropriate for the size and type of the firm and its practice, to determine whether an actual or potential conflict of interest existed in this case. Increasingly, law firms of all sizes are utilizing sophisticated computer programs and hiring experienced counsel with special training or background in legal ethics to guard against actual and potential conflicts among its potential, current and former clients. Lawyers in those firms who request a conflicts check from the firm's general counsel or ethics counsel have not, as apparently suggested by the Administrator,

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[9] As argued by the Administrator, it is the delegation itself, not an attorney's reliance upon the resulting advice, which is to be considered misconduct. Thus, if Butzel Long's general counsel had advised respondent that a conflict situation was present and the respondent then declined the representation, respondent would nevertheless be subject to disciplinary prosecution under MRPC 1.7 under the theory now advanced by the Administrator.

committed misconduct but have acted responsibly and ethically. We agree that the attorney who undertakes representation in violation of MRPC 1.7 is not immunized from a finding of professional misconduct because the conflicts question was first submitted to someone else in the firm but the hearing panel did not take that position and delegation of a conflict check was not charged as misconduct in this complaint.

IV. Conclusion

In an unpublished opinion issued February 24, 2005 in the case of In re John F. Irvin Testamentary Trust, No. 249974; (LC No. 02-000932-AV), the Michigan Court of Appeals reviewed the meaning of "directly adverse" as used in MRPC 1.7(a). In Irvin, the Court of Appeals defined "directly" as "exactly" or "precisely." Applying those definitions to the instant case, it is clear that while the interest of MAC and AAA 1-B could be seen as potentially "adverse," (defined as "antagonistic" or "opposing one's interests." Random House Webster's College Dictionary (2001)), the interests of MAC and AAA 1-B were not "exactly" or "precisely" adverse. At most, the two clients had economic interests that were potentially adverse, but there is no record support for the conclusion that Butzel's representation of MAC in preparing a report was directly adverse to AAA 1-B. The relationship here between the two parties was simply too tenuous to form the basis for a violation of MRPC 1.7(a).

In its Opinion and Order, the hearing panel applied a similar analysis to the applicability of MRPC 1.7(b) which states that "a lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyers own interest . . ." For the reasons stated by the panel, we agree that a possible conflict does not itself preclude the representation and that, given the scope of Butzel Long's representation of AAA 1-B, its representation of MAC would not have materially interfered with respondent's independent professional judgment in considering alternatives, or foreclosed courses of action, that reasonably should have been pursued on behalf of MAC.

At issue in this case is the hearing panel's Opinion and Order setting forth its reasons for concluding that the respondent did not engage in professional misconduct in violation of MRPC 1.7. We conclude that the Grievance Administrator has not met his appellate burden of persuading us that the hearing panel's procedures were fatally flawed, that the presence of expert opinion letters in the record constituted reversible error, that the respondent's reliance on his firm's general counsel to perform a conflict check constituted additional misconduct not charged in the complaint, that the

panel reached the wrong result, or that the panel's decision should be reversed for any other reason. The hearing panel's decision to dismiss the formal complaint is therefore affirmed.

Board members Theodore J. St. Antoine, William P. Hampton, George H. Lennon, Rev. Ira Combs, Jr., and Lori McAllister concur in this opinion.

Board members Marie E. Martell, Ronald L. Steffens, Billy Ben Baumann, M.D., and Hon. Richard F. Suhrheinrich did not participate.

STATE OF MICHIGAN
ATTORNEY DISCIPLINE BOARD

GRIEVANCE ADMINISTRATOR,
Attorney Grievance Commission,

Petitioner,

ADB Case No. 03-061-GA

v

DAVID W. POTTS (P19043)

Respondent

_____/

Before Tri-County Hearing Panel #63
George Googasian, Chairperson
Gary August, Member
Mark Lyon, Member

OPINION AND ORDER

This matter comes before the Panel on Respondent's Second Motion for Summary Disposition ("Summary Disposition Motion"). The Petitioner has filed a Brief In Response to Respondent's Brief in Support of Respondent's Motion for Summary Disposition, and Respondent filed a Reply Brief. A hearing was held on the Summary Disposition Motion on August 23, 2004.

PROCEDURAL HISTORY

Petitioner in this matter served a Formal Complaint on May 6, 2003 against Respondent David W. Potts (P# 19043) alleging professional misconduct against Respondent in violation of MCR 9.104(A)(1) - (4) and MRPC 1.7(a), (b) and 8.4(a), (c). Respondent served an Answer to the Formal Complaint. On June 24, 2003 the composition of the Panel was finalized to include Mr.

Mark Lyon (Member), joining Mr. George Googasian (Chairman) and Gary August (Member). The Petitioner and Respondent had numerous conferences and hearings before the Panel, and the Panel had many opportunities to be presented with the factual background of this case, the legal theories and the positions of the parties.

On October 2, 2003 Respondent served a Motion for Summary Disposition. Petitioner filed a response, and Respondent a Reply. The parties convened for a hearing on December 9, 2003 where this first Motion for Summary Disposition was considered by the Panel along with other miscellaneous matters. In an order dated December 10, 2003, the Panel took the first Motion for Summary Disposition under advisement and ordered that additional documentation be provided to the Panel. The parties complied with the December 10, 2003 order. On January 9, 2004, the Panel issued an order denying Respondent's first Motion for Summary Disposition without prejudice. Respondent filed a Petition for Interlocutory Review and Appeal of the denial of his first Motion for Summary Disposition along with a motion for stay of proceedings.

The Panel held a hearing on February 18, 2004 at which time the Panel, with the agreement of both Respondent and Petitioner, agreed to hold a limited evidentiary hearing related to four issues: (1) The extent, and scope, of Butzel Long's representation of AAA 1-B; (2) whether respondent accepted representation that was directly adverse to AAA 1-B; (3) whether respondent accepted representation that would materially limit Butzel Long's responsibilities to another client; and (4) what procedures were adopted by Butzel Long to determine the parties and issues involved and to

determine whether there were actual or potential conflicts of interest. The scope of this evidentiary hearing, and the witnesses to be called, was then embodied in a February 23, 2004 order.[1]

The parties convened for the limited evidentiary hearing on March 8, 2004. At that hearing the Panel heard testimony from Ms. Sandra K. Reminga of AAA 1-B, Mr. Gary W. Klotz of Butzel Long, Respondent, and Marsha L. Proctor of Butzel Long. At the close of the evidentiary hearing at 10:30 p.m. counsel for Respondent withdrew his pending motion to stay. The Panel then issued an Order dated April 1, 2004 that all dispositive motions, motions in limine, or other pre-trial motions be filed on or before April 30, 2004.

Respondent then timely served on April 27, 2004 his Summary Disposition Motion.

FACTS

The parties have presented to the Panel an extensive factual record in this matter. In addition to the evidence taken at the March 8, 2004 limited evidentiary hearing, the parties have provided the panel with numerous exhibits, recorded witness statements, and opinions of experts. The Panel has considered all the information provided to it as part of the record on the Summary Disposition Motion.

Respondent is an attorney with the Butzel Long law firm. Respondent has been a member of the Michigan State Bar since his admission in 1969. In about February of 1999 Respondent joined

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[1] The Panel is not persuaded by Petitioner's objection to the evidentiary hearing. The Panel notes that Petitioner and Respondent agreed on the February 18, 2004 hearing record to the evidentiary hearing process. The Panel is also not persuaded by Petitioner's objection to Respondent filing the second Summary Disposition Motion. The January 9, 2004 order specifically states that the denial of Respondent's original Summary Disposition Motion was without prejudice.

the law firm of Butzel Long. Respondent practiced out of the Bloomfield Hills office of Butzel Long in the Business Litigation and Family Law practice groups.

At the end of 1999 Respondent had a conversation with a lobbiest named Mel Larsen who inquired whether Respondent would accept a referral of a matter to be handled for the Michigan Association of Counties ("MAC"). Respondent met with Mr. Tim McGuire from MAC to learn what services MAC was requesting Butzel Long to perform. At some point, Respondent was given a document from MAC that set forth its "Goal" and its "Objectives." The "Goal" stated in this document is to "Improve funding and delivery of services to the elderly population served in each county through choice and competition." The objectives included: (1) each county having the option to create its own planning service area or to partner with the Area Agency on Aging ("AAA") of its choice; (2) noncontiguous boundaries so that counties could choose which AAA it will partner with; (3) county approval of AAA budgets; and (4) preparation of a position paper setting forth an assessment of the current system, identifying problems with that system, reviewing State and Federal rules and regulations, and making recommendations for change in the system.

Respondent then initiated a conflicts check within Butzel Long. Respondent has limited recollection of how the conflicts check was undertaken. We find it undisputed, however, that Respondent signed a new matter form and a conflicts check was initiated by Butzel Long. Ms. Marsha Proctor of Butzel Long testified she typed in a portion of the information on the new matter form based on a telephone conversation with Respondent. According to testimony by Ms. Proctor, a proposed retainer agreement was attached to the draft new matter form submitted to her by Respondent. The initial Butzel Long conflict search generated a 217-page report. Once this report was generated, Respondent has limited recollection of what subsequently occurred. It is undisputed,

however, that the report generated AAA 1-B as a "hit." Ms. Proctor testified, and the Panel accepts, that at the time the initial conflict check was run AAA 1-B was an existing client of Butzel Long. Ms. Proctor undertook an analysis of the Michigan Rules of Professional Conduct 1.7 and determined that there was no conflict of interest created by Butzel Long performing the anticipated legal services for MAC even though AAA 1-B was an existing client. Ms. Proctor claims she conveyed this information to Respondent.

AAA 1-B had become a client of Butzel Long sometime in March of 1998 when Mr. Gary Klotz joined the Butzel Long firm. Mr. Klotz had performed legal services for AAA 1-B with his prior firm, Keywell and Rosenfeld. Mr. Klotz testified that he provided employment relations and employment law counseling to AAA 1-B. Mr. Klotz also testified that AAA 1-B occasionally asked a question that was not an employment law question. Ms. Sandra K. Reminga, the executive director and president of AAA 1-B, also testified that occasionally Mr. Klotz was asked to address a question that was not an employment law question while at Butzel Long. These included, for example, the risks of doing business with limited liability companies and a contractual matter with Caring Alternatives. Butzel Long was also requested to provide information to AAA 1-B's auditors. However, while Mr. Klotz was at Butzel Long, Ms. Reminga testified that no legal issues related to AAA 1-B's funding had arisen. Thus, at no time had Butzel Long addressed any funding issues for AAA 1-B.

Respondent undertook the representation of MAC pursuant to a January 25, 2000 retainer agreement countersigned by MAC on February 4, 2000. A draft report was prepared and sent to MAC's Scott Dizurka on March 29, 2000. A copy was also sent to Mr. Larsen. Respondent also discussed with Lynn Alexander, the Chairperson of the Office of Aging, how to submit the report

to the Governor. An Agenda of the Michigan Commission on Services to the Aging was at some point prepared with the inclusion of a presentation by MAC at an April 28, 2000 joint meeting with the Michigan Commission on Services to the Aging and the State Advisory Counsel. Respondent received a call from Julia Darlow on April 27, 2000. Ms. Darlow is an attorney with Dickenson Wright who contacted Respondent on behalf of AAA 1-B to demand that the draft report not be presented at the joint meeting on April 28, 2004. Respondent does not know what action he took after that call, but he did not appear at the April 28, 2004 joint meeting. Rather, he claims he went fishing. Mr. Dizurka submits an affidavit stating that Respondent was scheduled to present the background information on the draft legal research at the April 28, 2000 meeting. However, Mr. Dizurka received a call while driving to the meeting that Respondent was unable to attend.

The draft report was presented by MAC at the April 28, 2000 joint meeting. Ms. Reminga was in attendance at the joint meeting and took exception to the presentation of the draft report at the joint meeting based on inaccuracies and statements that she alleged directly impugned the character and reputation of AAA 1-B.

The draft report makes certain criticisms of the AAA system. These include that AAAs are not held accountable, that they duplicate services, that they reduce funds available to other contractors, and that they determine how much to pay themselves for services provided. The draft report also made recommendations for changes to local rules such that multi-county AAAs would have to submit area plans to member counties for approval, counties would be given the right to opt out of their Public Service Area and AAA with which they were affiliated, counties could have a single-county AAA, and counties could apply for AAA designation or affiliate with a AAA of its choice. The draft report further named AAA 1-B specifically and used AAA 1-B in examples. The

draft report was ultimately acted upon, arguably to the detriment of AAA 1-B. When the draft report was finalized, Respondent removed any specific reference to AAA 1-B.

RESPONDENT'S SUMMARY DISPOSITION MOTION

Respondent brings its Summary Disposition Motion pursuant to MCR 2.116(C)(8) and MCR 2.116(C)(10). Respondent's first argument seeks dismissal under MCR 2.116(C)(8) claiming that the Petitioner's formal complaint is inadequate and fails to state a claim pursuant to MCR 2.116(C)(8). The basis for this argument is that Petitioner failed to accurately plead the requirements of MRPC 1.7(a) that Respondent's representation of MAC was directly adverse to AAA 1-B. While Respondent is correct that paragraph 27(b) of the Formal Complaint omits the word "directly" prior to "adverse," this is not a basis for dismissal under MCR 2.116(C)(8). Petitioner has adequately put Respondent on notice that it is alleging a violation of MRPC 1.7(a), and the failure of Petitioner to include the word "directly" is nothing more than a technical error. Respondent's argument is nothing more than an attempt to put form over substance. Thus, the Panel will deny the portion of Respondent's Motion brought pursuant to MCR 2.116(C)(8) and proceed to address the portion of the motion brought pursuant to MCR 2.116(C)(10).

The bulk of the Summary Disposition Motion before the Panel is that the undisputed facts fail to support a claim of misconduct and are subject to dismissal under MCR 2.116(C)(10). Thus, we begin our analysis with the question whether there is a genuine issue as to any material fact that would preclude dismissal of this matter as a matter of law. Since the Panel finds the above facts have been established, it must apply those facts to the claims of misconduct plead against the Respondent. After the application of those facts, the Panel must determine if Petitioner has sufficiently stated a claim to avoid summary disposition and whether there are material facts in

dispute that would preclude summary disposition. In doing so, the Panel may only grant summary disposition if it is impossible for a record to be developed which would present a question upon which reasonable minds could differ. Skinner v Square D Co, 445 Mich 153, 162 (1994). The Panel has reviewed the case of Grievance Administrator v Geoffrey N. Fieger, ADB Case No. 94-186-GA (June 4, 1996), and its requirements that hearing panels should only "reach the determination that there exists no genuine issue of material fact only after the most careful consideration." The Panel is also well aware of the inability to compel discovery (or obtain affidavits) from non-parties in order to support motions under MCR 2.116(C)(10). See MCR 9.115(F)(4). Thus, the Panel must also consider that Petitioner may be able to secure other evidence on the material issues related to the Summary Disposition Motion before it could grant the motion.

Respondent begins its argument under MCR 2.116(C)(10) by arguing that Respondent is a lawyer subordinate to Ms. Proctor within the meaning of MRPC 5.2 which reads in part:

> (b) A subordinate lawyer does not violate the rules of professional conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

The Panel refuses to accept that Ms. Proctor is a supervising attorney on the issue of whether Respondent must accept the representation of MAC. While it is possible that Ms. Proctor has final say whether Butzel Long was precluded from representing MAC, that was not what happened. It is possible that a decision not to undertake the representation of MAC as a client may have rested with Ms. Proctor, but the decision to undertake MAC as a client rested solely with Respondent. Simply put, Ms. Proctor did not force Respondent to accept the representation of MAC. She simply advised him that the firm could undertake the matter from a professional liability standpoint. March 8, 2004

Transcript, page 137, line 12-16. The ultimate decision on whether to accept the representation of MAC rested with Respondent at all times. MRPC 5.2 should not be read to protect the attorney who at all times had the ability to ultimately chose to accept or not accept the representation. Thus, the Panel finds that Respondent is not a subordinate attorney who deferred to a supervisory lawyer pursuant to MRPC 5.2.

Thus, the Panel next turns to whether Respondent violated the provisions of MRPC 1.7 by his representation of MAC. MRPC 1.7 is the general rule on conflicts of interest. Subpart (a) of MRPC 1.7 reads as follows:

> A lawyer shall not represent a client if the representation of that client will be directly adverse to another client unless:
>
> (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
>
> (2) each client consents after consultation.

There is no dispute in the record that AAA 1-B was a client of Butzel Long at the time of the MAC representation. Likewise, there is no dispute that AAA 1-B's consent to Butzel Long's representation of MAC was neither sought nor obtained. Consequently, Respondent will be in violation of MRPC 1.7(a) if Petitioner can establish that the representation of MAC was directly adverse to AAA 1-B.

There does not appear to be a hard and fast rule of what circumstances constitute a "directly adverse" representation. The Panel agrees with the statement of Petitioner that "[t]he interpretation of the 'direct adversity' component of MRPC 1.7(a) is one of law for this hearing panel to decide based upon the proofs." Petitioner's May 21, 2004 Brief at 29. The official comment to MRPC 1.7

recognizes the difficulty of determining whether there is "direct adversity" outside of the litigation process:

> Conflicts of interest in contests other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for adverse effect include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise, and the likely prejudice to the client from the conflict if it does arise. The question is often one of proximity and degree.

The Panel uses the factors identified in the Comment as a guide to determine whether Respondent's representation of MAC was directly adverse to Butzel Long's representation of AAA 1-B.

The first factor is the duration and intimacy of the lawyer's relationship with the client or clients involved. The earliest date AAA 1-B became a client of Butzel Long was March of 1998. The potential representation of MAC was first presented to Butzel Long at the end of 1999, and was formalized in February 2000. Thus, at the time of the initial conflict check for the representation of MAC, AAA 1-B had been a client of Butzel Long for less than two years. In that two years, there is no evidence that Butzel Long became intimate with the funding or operations of AAA 1-B. In fact, the evidence presented is to the contrary. Butzel Long, through attorney Gary Klotz, primarily represented AAA 1-B on employment issues. While Butzel Long provided some advice on a contractual issue related to personnel files and the risks of contracting with limited liability companies, it was not intimate with the funding mechanisms or services performed by AAA 1-B. Moreover, responding to an audit inquiry setting forth potential claims exposure in no way relates to issues involving funding or operations of AAA 1-B. There can be no argument that Butzel Long

learned intimate information about the funding and operations of AAA 1-B through its prior or current legal representation of AAA 1-B that would compromise or prejudice AAA 1-B in the future.

The functions to be performed by Respondent for MAC were set forth in the retention letter between MAC and AAA 1-B. While this work is characterized by Respondent and Butzel Long as a neutral research project, MAC clearly set forth its intended goals and objectives. These goals and objectives, if supported by Respondent after its research, would recommend certain changes to the existing system that includes Area Agencies on Aging. The January 25, 2000 retainer letter does not contemplate that the report was to be publically presented by Butzel Long. Regardless, it was still MAC's belief that Respondent was going to attend the joint meeting on April 28, 2004 to present the background on the legal research. See Affidavit of Scott Dzurka. Respondent claims he was always scheduled to go fishing on April 28, 2004.

This leads to the next factor of the likelihood that actual conflict will arise. Whether the recommendations would ultimately have a negative impact on AAA 1-B depended on many additional factors. These include how MAC would choose to use the report, how the report was acted upon (if at all), whether AAA 1-B would take issue with the conclusions drawn in the report, and whether the actions taken in response to the report would ultimately have a negative impact in some way on AAA 1-B. Therefore, the future impact of the report on AAA 1-B was speculative. Simply put, it was not a certainty that the MAC assignment would result in an actual conflict with AAA 1-B.

The final factor to be considered in the comment to MRPC 1.7 is the likely prejudice to AAA 1-B if the conflict does arise. We find the potential prejudice to AAA 1-B to be minimal. AAA 1-B was a participant in the joint meetings and even received a copy of the draft report prior to the joint

meeting. It had the opportunity to retain other counsel, and did so. The fact that Butzel Long was unable to represent it in the arguing against funding and operational changes did not prejudice AAA 1-B since Butzel Long had no prior relationship with AAA 1-B on these issues. With all due respect to the attorneys at Butzel Long, AAA 1-B did not receive a lesser quality of service because it hired the law firm of Dickenson Wright instead of Butzel Long. The only ways AAA 1-B would have been prejudiced is if: (1) its existing relationship with Butzel Long somehow qualified Butzel Long to provide a unique and superior, or somehow more efficient, quality of service that could not be duplicated by another law firm; or (2) Butzel Long learned information in its prior or current representation of AAA 1-B that could be used against AAA 1-B. This is simply not the case given the limited scope of Butzel Long's prior representation of AAA 1-B that was almost exclusively as labor counsel.

The comments in MRPC 1.7 speak of loyalty being an essential element in the lawyer's relationship to a client. However, the duty of loyalty is not without limitation. The comment to MRPC 1.7 allows some adverse representation when it states "simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients." (Emphasis added). We find that Butzel Long's representation of AAA 1-B at the time it undertook the representation of AAA 1-B was unrelated to its anticipated representation of MAC on funding and service issues involving Area Agencies on Aging. Petitioner has presented an expert report by John F. Burns in an attempt to show how Butzel Long's representation of AAA 1-B on labor matters is related to Respondent's representation of MAC. Mr. Burns opines, in part, as follows:

> MAC's goals clearly beg the question, what will happen to employment at AAA 1-B if they are carried out.
>
> * * *
>
> The "opt-out" advocated by Respondent could directly impact employment at AAA 1-B and thus was directly related to the employment work Respondent's firm did for AAA 1-B.

In other words, Petitioner's expert opines that Respondent's representation of MAC could ultimately result in a decision by a third party that could negatively impact funding to AAA 1-B that would then possibly impact AAA 1-B's workforce. This argument is so attenuated that it actually illustrates how many steps removed Butzel Long's representation of AAA 1-B was on financial issues. In fact, this argument seems to fall squarely within the language in the Comment to MRPC 1.7 that representation of clients with adverse economic interests is not a "directly adverse" representation.

Consequently, when weighing all the factors set forth in the Comment to MRPC 1.7, the Panel finds that Respondent's representation of MAC was not "directly adverse" to AAA 1-B at the time of the initial retention.

Petitioner argues, however, that Respondent violated MRPC 1.7(a) by failing to reinvestigate the potential conflict with AAA 1-B after the research was completed and the draft report was written. As an initial matter, we agree that an attorney has a duty to withdraw from representation of a client if a conflict of interest arises during the representation. This principle is set forth in the Comment to MRPC 1.7 as follows:

> If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation. See Rule 1.16.

Respondent and Ms. Proctor have testified that they did not reevaluate the conflict issue between MAC and AAA 1-B at the time the draft report was prepared. The question, however, is whether the representation of MAC changed and became "directly adverse" to AAA 1-B once the report was written.

The findings of the draft report are consistent with the initial goals and objectives of MAC. The most significant addition, however, is the reference to AAA 1-B in particular. The references to AAA 1-B are mostly factual in nature, as opposed to opinion. While there is some argument that the draft report is factually inaccurate when it comes to its description of AAA 1-B, this is not a factor for making a determination whether a conflict exists under MRPC 1.7(a). The opinions expressed in the report go more to the entire AAA system, as opposed to a criticism of AAA 1-B in particular. Regardless, even if Respondent were criticizing AAA 1-B in particular, this would not be deemed to be a "directly adverse" representation for the same reasons as discussed when the representation of MAC was initially undertaken. Butzel Long's representation of AAA 1-B primarily on employment matters is still too attenuated of a relationship to claim that its criticism of the AAA system in a draft report for MAC violated any duty of loyalty to AAA 1-B and was a directly adverse representation.

Consequently, the Panel finds that Respondent's representation of MAC was not "directly adverse" to AAA 1-B after the creation and dissemination of the draft report, or at any time subsequent. Therefore, the Panel grants summary disposition in favor of Respondent pursuant to MCR 2.116(C)(10) on Petitioner's claim that Respondent violated MRPC 1.7(a).

Petitioner has also plead that Respondent violated MRPC 1.7(b) by its representation of MAC at a time when AAA 1-B was a client of Butzel Long. MRPC 1.7(b) states that a "lawyer shall

not represent a client if the representation of that client may be materially limited by the lawyers responsibilities to another client or to a third person, or by the lawyer's own interest . . . ." Petitioner argues that Respondent's representation of MAC was limited due to the duties owed by Butzel Long to AAA 1-B.

The Comment to MRPC 1.7 addresses, in part, conflicts under subpart (b) of the rule as follows:

> Loyalty to a client is also impaired when a lawyer cannot consider, recommend, or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. Paragraph (b) addresses such situations. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. (Emphasis added).

The Panel in its analysis of MRPC 1.7(a) has already addressed the likelihood that the representation of MAC would become directly adverse to AAA 1-B, and the analysis of this factor under MRPC 1.7(b) is no different. Given the scope of Butzel Long's representation of AAA 1-B, its representation of MAC would not materially interfere with Respondent's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of MAC. Therefore, the Panel grants summary disposition in favor of Respondent pursuant to MCR 2.116(C)(10) on Petitioner's claim that Respondent violated MRPC 1.7(b).

Petitioner's claim that Respondent violated MCR 9.104(A)(2) and (3) depend in large part, if not entirely, on the establishment of a violation of the rules of professional conduct in some manner. MCR 9.104(A)(2) and (3) state the following are misconduct and grounds for discipline:

(2) conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach;

(3) conduct that is contrary to justice, ethics, honesty and good morals.

The conduct complained of by the Petitioner simply does not rise to the level of exposing the legal profession to obloquy, contempt, censure, or reproach. Neither was the conduct of Respondent contrary to justice, ethics, honesty and good morals. As such, the Panel grants summary disposition in favor of Respondent pursuant to MCR 2.116(C)(10) on Petitioner's claim that Respondent violated MCR 9.104(A)(2) and (3).

Finally, Petitioner has plead that Respondent violated MRPC 8.4 and MCR 9.104(A)(4). Since these rules depend on the separate violation of another rule of professional conduct, the Panel grants summary disposition in favor of Respondent pursuant to MCR 2.116(C)(10) on Petitioner's claim that Respondent violated MRPC 8.4 and MCR 9.104(A) in their entirety.

The Formal Complaint in this matter is dismissed with prejudice.

George A. Googasian, Chairperson
Gary August, Member
Mark Lyon, Member

Dated: September 15, 2004