

STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellee,

v

Linda S. Cook, P 49870,

Respondent/Appellant,

Case No. 03-10-RD

Decided: October 22, 2004

Appearances:

Cynthia C. Bullington, for Grievance Administrator, Petitioner/Appellee
Robert H. Golden, for the Respondent/Appellant

BOARD OPINION

In this reciprocal proceeding conducted under MCR 9.104(B), the hearing panel appointed by the Attorney Discipline Board found that the Grievance Administrator had provided satisfactory proof of an adjudication of misconduct in a discipline proceeding conducted under the auspices of the Supreme Court of Ohio. The panel further found that the respondent was afforded due process of law in the course of the original proceedings in Ohio. Finally, on the issue of the appropriate level of discipline, the panel found that although the actual discipline imposed on the respondent in Ohio was a six-month suspension, it would be inappropriate to suspend respondent's license in Michigan for a period of time that would require separate reinstatement proceedings in this jurisdiction.¹ Accordingly, the panel imposed a "six-month" suspension of 179 days.²

¹ The Report of Tri-County Hearing Panel #11, filed March 5, 2004, is attached as Appendix A.

² The panel noted that although the respondent received an effective suspension of six months in Ohio, license suspension in Michigan is measured in days, not months. Under MCR 9.123(A), a suspension of 179 days or less may be terminated automatically by the filing of an affidavit. Under MCR 9.123(B), however, a suspension of 180 days or more requires separate reinstatement proceedings which include the filing of a petition, the payment of an administrative fee, an investigation by the Grievance Administrator and a reinstatement hearing before a hearing panel.

The respondent has petitioned for review on the grounds that the Grievance Administrator failed to present proof of an adjudication of misconduct within the meaning of MCR 9.104(B); that the respondent was denied procedural and substantive due process in the Ohio proceeding; and that a suspension of 179 days is inappropriate under the American Bar Association's Standards for Imposing Lawyer Sanctions. The Grievance Administrator does not seek review. For the reasons discussed below, we conclude that the certified copy of an order of discipline entered by the Ohio Supreme Court constitutes an adjudication of misconduct in a disciplinary proceeding which passes constitutional muster. We further conclude that the hearing panel did not err in its decision to impose a reciprocal suspension in Michigan of 179 days. The hearing panel's order of March 5, 2004 is affirmed.

This reciprocal discipline action was commenced January 15, 2003 when the Grievance Administrator filed a petition for order to show cause accompanied by a certified copy of an order entered by the Supreme Court of Ohio on November 6, 2002 in the matter of Toledo Bar Association v Linda S. Cook. That order directed that the respondent's license to practice law in Ohio should be suspended for one year, with six months of that period suspended on the condition that she complete continuing legal education courses. On January 21, 2003, the Board entered an order to show cause directing Ms. Cook to appear before a hearing panel in Michigan to show cause why reciprocal discipline should not be entered in accordance with MCR 9.104(B). That rule provides:

(B) Proof of an adjudication of misconduct in a disciplinary proceeding by another state or a United States court is conclusive proof of misconduct in a disciplinary proceeding in Michigan. The only issues to be addressed in the Michigan proceeding are whether the respondent was afforded due process of law in the course of the original proceedings and whether imposition of identical discipline in Michigan would be clearly inappropriate.

The respondent filed a reply on February 25, 2003 which essentially raised the same issues now presented to the Board for review, i.e.,

1. that there was no "adjudication of misconduct in Ohio;
2. that respondent was denied procedural and substantive due process in the Ohio proceeding; and
3. discipline in Michigan is unwarranted and improper.

Attorney Discipline Board Tri-County Hearing Panel #11 conducted public hearings during which the Grievance Administrator introduced documentary evidence from the Ohio proceeding entitled Toledo Bar Association, relator, v Linda S. Cook, respondent. These included a stipulation of fact (Petitioner's Exhibit A) signed by the respondent containing the stipulation that, "By preparing a will and/or a trust instrument for a client which named as a beneficiary a corporation wholly owned by her siblings, respondent has violated DR 5-101(A)(2)"; the order of the Supreme Court of Ohio entered November 6, 2002 (Petitioner's Exhibit C) suspending the respondent from the practice of law in Ohio for a period of one year, with six months of that period suspended on condition that she complete certain CLE courses; an amended written agreement dated September 17, 2001 signed by the respondent (Petitioner's Exhibit D) also containing the respondent's stipulation that she had violated DR 5-101(A)(2); and a document entitled "Findings of Fact, Conclusions of Law and Recommendation of Commissioners on Grievances and Discipline of the Supreme Court of Ohio" filed in the Supreme Court of Ohio on May 1, 2002 (Petitioner's Exhibit F). The respondent testified in her own behalf.

The record before the panel discloses that respondent represented a client who, at the time of his wife's death in 1997, controlled assets in a marital trust and a family trust, each having assets of approximately \$300,000.00. In November 1998, the client entered Advanced Living Inc., an adult-care group home wholly owned by the respondent and her siblings. At some point, the client told the respondent that he wanted to change the beneficiary of the marital trust from his children to Advanced Living Inc. To avoid what she recognized as a conflict of interest, the respondent surrendered her shares in Advanced Living and resigned her positions in the related corporations. In December 1998, the respondent then prepared a will for her client which essentially donated the sum of \$300,000.00 to Advanced Living Inc. The respondent's client died in November 1999.

The respondent specializes in wills and trusts. She acknowledged that she knew that she was prohibited under the applicable disciplinary rules in Ohio from drafting a will or other instrument naming herself as a beneficiary. She was careful to sever her ties with the assisted care facility

owned by her siblings before amending the will for her client. The respondent professed to be unaware that the then applicable provision of Ohio's DR 5-101(A)(2)³ provided that:

Notwithstanding the consent of the client, a lawyer shall not knowingly prepare, draft or supervise the preparation or execution of a will, or intervivos trust for a client in which any of the following are named as beneficiary:

- (a) the lawyer;
- (b) the lawyer's law partner or a shareholder of the lawyer's firm;
- (c) an associate, paralegal, law clerk or other employee in the lawyer's firm or office;
- (d) a lawyer acting "of counsel" in the lawyer's firm;
- (e) the spouses, siblings, natural or adoptive children, or natural or adoptive parents of any of those described in divisions (A)(2)(a) through (d) of this rule. [Emphasis added.]

The record further discloses that when the children of respondent's client discovered the revised terms of the will, they retained counsel to contest the bequest to Advanced Living. In February 2000, respondent resigned as trustee of the marital trust and Advanced Living Inc. disclaimed any interest in the estate.

The disciplinary proceedings in Ohio upon which this reciprocal action is based were formally commenced on July 11, 2001 when a complaint was filed against the respondent by the Toledo Bar Association. In her answer to that complaint, respondent admitted the factual allegations but entered a general denial that her conduct violated Ohio's DR 5-101(A)(2). On September 17, 2001, as the result of settlement negotiations, the Toledo Bar filed an amended complaint and on the following day, September 18, 2001, the respondent filed an amended answer. The respondent acknowledges that she was represented by counsel. She testified that it was her understanding at the time the if she acknowledged that she had committed misconduct by violating

³ A similar prohibition is found in Michigan Rule of Professional Conduct 1.8(c):

A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.

DR 5-101(A)(2), the Toledo Bar Association would accept a public censure. However, the agreement was not accepted by the hearing panel in Ohio and the Board of Commissioners on Grievances then returned the matter to the same panel which had rejected the consent agreement.

On February 5, 2002, the respondent appeared before a three-person hearing panel of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio. The respondent was represented by counsel. At the commencement of the hearing, respondent's counsel advised the panel that the respondent had stipulated to a violation of DR 5-101(A)(2) but would take the stand to provide further information. Having been sworn, the respondent testified at some length as to the circumstances described in the Toledo Bar's complaint. She specifically admitted that her conduct violated Ohio's DR 5-101(A)(2). At the conclusion of the proceedings, the panel rejected the agreement of the parties that respondent should receive a public reprimand. Instead, the panel concluded that a six-month suspension with six months stayed, with a two year probationary period would be appropriate. On further consideration, the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio adopted the panel's findings of fact and conclusions of law but recommended that "based on her knowledge of this area of law coupled with a stunning conflict of interest and lack of candor at the hearing," the respondent should be suspended from the practice of law in the State of Ohio for a period of two years with one year stayed for a period of probation. That recommendation was submitted to the Supreme Court of Ohio on May 1, 2002.

On November 6, 2002, the Supreme Court of Ohio issued its order (Exhibit C). The order recites that the respondent had filed objections to the final report of the Board of Commissioners, that the Toledo Bar had filed an answer and that the matter had been considered by the Court. The Court ordered that the respondent be suspended from the practice of law in Ohio for a period of one year with six months of that period suspended on the condition that, during the one year period, respondent complete CLE courses in office management and ethics concerning the preparation of wills and trusts under the Bar's supervision.

Based upon its consideration of this record and the arguments of the parties, Tri-County Hearing Panel #11 issued its report and order on March 5, 2004. The panel concluded that the respondent was the subject of an adjudication of misconduct in Ohio and that the adjudication constituted conclusive proof of misconduct in Michigan. The panel then outlined its findings that

the discipline procedure followed in Ohio satisfied the constitutional requirements of due process in that respondent had (1) notice of the time and place of the hearing, (2) a reasonably definite statement of the charges against her, (3) an opportunity to be heard and present a defense before a properly authorized body, and (4) fair consideration of the evidence with due regard to the nature of the proceedings. See In re Van Hyning, 257 Mich 146, 151 (1932). As noted above, the panel also addressed the issue of whether identical discipline in Michigan would be clearly inappropriate. The panel concluded that it would not be appropriate to require the respondent to undergo reinstatement proceedings in Michigan. The panel therefore imposed a suspension of 179 days.

In requesting that this Board overturn the hearing panel's order for reciprocal discipline, the respondent first argues that the Ohio proceeding was fundamentally unsound because the hearing in that jurisdiction was conducted before the same panel which originally rejected the parties' proposal for a public censure. It is true, as the respondent points out, that if a consent discipline proposal is rejected by a hearing panel in a disciplinary proceeding in Michigan, "the matter must then be referred for hearing to a hearing panel other than the one that passed on the proposed discipline." MCR 9.115(F)(5). However, under MCR 9.104(B), the requirements for imposing reciprocal discipline do not include a showing that the disciplinary proceeding in another jurisdiction conformed to Michigan requirements. The test is whether the respondent "was afforded due process of law in the course of the original proceedings."

Moreover, once it has been established to the satisfaction of a panel that the foreign proceeding comported with notions of fundamental due process, it is not necessary for the hearing panel in Michigan to then act as an appellate tribunal as to procedural issues which could have, or should have, been raised in the original proceeding. This is especially true when, as in this case, the order of discipline has been issued by another state's highest court. Presented with an argument in a recent reciprocal discipline case that a discipline proceeding in Connecticut was flawed because it failed to comport with Connecticut case law, the Board held:

The respondent raises an additional argument that the Connecticut ruling in his case was erroneous under a prior Connecticut case . . .

It is not necessary for the Board to consider this argument. Under MCR 9.104(B), the Connecticut decision is conclusive proof of misconduct unless the respondent can show that the Connecticut

decision was the result of a fundamental denial of due process. His time to challenge the Connecticut decision was in an appeal to a court in Connecticut. Having waived his right to challenge the Connecticut opinion in Connecticut, he cannot challenge it now in Michigan. [Grievance Administrator v C. Robert Knight, Case No. 02-100-RD (ADB 2003).]

We are not persuaded that the respondent has identified a fundamental right of due process which was violated because the respondent appeared before a panel in Ohio which had rejected the plea agreement previously tendered by the parties.

Furthermore, while respondent appears to focus solely on the original consent discipline proposal which was rejected (10/2/03 Tr, p 26, Exhibit D), the respondent's admissions in that rejected agreement were not the admissions upon which her discipline in Ohio was ultimately based. After the rejection of the original agreement, the respondent, a licensed attorney, appeared in person before a three-person hearing panel of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio on February 5, 2002. She was represented by counsel. She listened, without objection, while her counsel stipulated on the record to a violation of DR 5-101(A)(2). The respondent was then sworn and testified. She specifically admitted that her conduct violated Ohio's DR 5-101(A)(2). On the basis of that sworn admission of misconduct in a disciplinary proceeding, we are unable to accept the respondent's argument now that the Ohio Supreme Court did not have a sufficient basis for a finding of misconduct. We can only repeat the observation by the Michigan hearing panel that:

Accordingly, this panel can make the only conclusion that flows naturally from these facts: respondent not only had an opportunity to be heard and present a defense before a properly authorized body, but she did so. [Hearing Panel Report 3/5/04, p 6.]

Finally, with regard to the level of discipline imposed by the hearing panel, the Board does not believe that the respondent has shown that the Ohio discipline order was the result, as respondent argues, of only a technical violation of the rules with no resultant harm to the client or the public. We commend the hearing panel for its thoughtful consideration on the question of whether "identical discipline," i.e. a suspension of 180 days requiring duplicative reinstatement proceedings in Michigan, would be clearly inappropriate. We are inclined to agree with the Grievance

Administrator that the 179 days suspension ordered by the panel in this case, while possibly lenient, is an appropriate sanction under MCR 9.104(B) and the American Bar Associations Standards for Imposing Lawyer Sanctions. The hearing panel's order of March 5, 2004 is affirmed.

Board members Theodore J. St. Antoine, William P. Hampton, Marie E. Martell, Ronald L. Steffens, Rev. Ira Combs, Jr., George H. Lennon, Billy Ben Baumann, M.D., Lori McAllister and Hon. Richard F. Suhrheinrich concur in this decision.