STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner,

v

Raymond A. MacDonald, P-16918,

Respondent,

Case No. 00-190-GA

Decided: June 24, 2002

BOARD OPINION

I. Introduction

This matter is currently before the Board on the respondent's motions: to quash and dismiss the formal complaint; for development of a separate record; for a Rule 9.113(B)(3) hearing; and for notice to the Michigan Attorney General and the State Bar of Michigan that a cause is pending before the Attorney Discipline Board which challenges the constitutionality of the attorney discipline system. For the reasons stated in the opinion below, the respondent's motions will be denied *in toto*.

II. Procedural History

The formal complaint in this case was filed on November 15, 2000. The respondent received an extension of time to file his answer to the complaint. The respondent filed several motions, including a motion to adjourn the hearing, which was granted. The hearing was adjourned without date. The respondent filed his answer to the formal complaint on December 18, 2000.

The respondent also filed a motion to sever the counts in the formal complaint, which was denied. Respondent's motion for a pre-trial hearing was denied, but the panel stated it would conduct a pre-trial conference on the date of the scheduled hearing, prior to the commencement of the taking of any testimony. The respondent next filed motions for a change of venue, to disqualify the hearing panel, and to strike and set aside the orders of the panel. The Board issued an order on May 25, 2001, denying the respondent's motions for change of venue and for disqualification of the

hearing panel.

On June 8, 2001 the respondent filed a motion to quash and dismiss the formal complaint. The respondent's motion to quash and dismiss the formal complaint is based largely on the respondent's claims that the Attorney Discipline Board lacks jurisdiction over him and that the attorney discipline system in Michigan is unconstitutional. The respondent has also filed motions: for development of a separate record to challenge the Michigan Court Rules; for hearing pursuant to MCR 9.113(B)(3); and for formal notice to the Michigan Supreme Court and the State Bar of Michigan that a cause is pending which challenges the constitutionality of MCR 9.000, *et seq*.

III. Discussion

A. Motion to Quash and Dismiss the Formal Complaint

The respondent's motion to quash and dismiss the formal complaint is based largely on challenges to the constitutionality of the attorney discipline system. Respondent also argues that the Attorney Discipline Board lacks jurisdiction over him. The respondent's jurisdictional argument is based on his underlying assertion that the Attorney Discipline Board exercises judicial power in contravention of both the United States Constitution and the Michigan Constitution.

The constitutionality of the delegation of power from the Michigan Supreme Court to the State Bar of Michigan and to the Attorney Discipline Board is well established. "The Michigan Supreme Court possesses inherent power to regulate the Bar." Patmon v Michigan Supreme Court, et al., 1998 U.S. Dist. LEXIS 20042 (E.D.Mich. 1998), citing Johnson v DiGiovanni, 347 Mich 118, 127; 78 NW2d 560 (1956).

The attorney discipline process does not operate in a constitutional vacuum. Rather, the Attorney Discipline Board acts in conformity with its statutory grant of authority and is cognizant of both federal and state case law precedent regarding constitutional issues. In Grievance Administrator v James A. Tucker, 94-12-GA (ADB 1995), lv den 449 Mich 1206 (1995), the Board stated that it is mindful of the need to afford respondents the protections guaranteed to them by both the U.S. Constitution and the Michigan Constitution:

> As the adjudicative arm of the Michigan Supreme Court for attorney discipline matters this Board is not infrequently faced with claims that a respondent's constitutional rights have been or will be jeopardized in the course of disciplinary proceedings. While recognizing its limited grant of authority, the Board has considered such claims and has applied constitutional precedents in the context of the discipline matters before it. See, e.g., Grievance Administrator v Robert J. Buk, 35947-A (ADB 1979) (applying Bates v State Bar of Arizona, 433 US 350 (1977) and holding that DR 2-103(A) did not violate the First Amendment or the Due Process Clause); Grievance Administrator v Peter R. Barbara, DP 62/86 (ADB 1988) (addressing indigent incarcerated respondent's due process claim for appointed counsel and psychiatric expert); Grievance Administrator v James N. Canham, DP 223/86 (ADB 1987) [applying In Re Ruffalo, 390 US 544 (1968)], and Grievance Administrator v Freid, 388 Mich 711 (1972) (due process cases which require that a finding of misconduct must be preceded by fair notice to the respondent); Grievance Administrator v Kenneth M. Scott, DP 189/86 (ADB 1989) (same; reversing finding of misconduct on due process grounds); Grievance Administrator v Leonard R. Eston, DP 75/85 (ADB 1987) (rejecting respondent's claim that he was denied Fifth Amendment right against self-incrimination and Miranda rights).

The Board has likewise noted that, while direct judicial review as of right may not be available, a respondent may petition the Michigan Supreme Court for leave to appeal a decision of the Attorney Discipline Board. A respondent may also file a petition for mandamus and seek the Michigan Supreme Court's superintending control of a discipline matter. The Board, in Tucker, supra, observed:

> A statute conferring power upon an administrative agency is not unconstitutional as violating due process of law merely because it does not expressly provide for judicial review of an administrative determination. This rule rests, at least in part, upon the principle that the right of judicial review with respect to certain kinds of issues is always implied, the court sometimes expressly stating that this right of review is guaranteed by a constitutional command. [2 Am Jur 2d, Administrative Law, § 423, 419-420 (footnotes omitted).]
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> Further, the Michigan Supreme Court has provided for review of the Board's decisions. A party aggrieved by the Board's decision may apply for leave to appeal to the Supreme Court. MCR 9.122(A); MCR 7.302. Such a party may present extensive briefing to the Supreme Court. MCR 7.301. The Court may grant leave, or the Court may correct any errors below by means of an order. MCR 7.316(A)(7). As with all appeals to the Supreme Court, if leave is granted, the Court may grant or dispense with oral argument. MCR 7.312(B)(2). Also, disciplinary proceedings are subject to the superintending control of the Supreme Court. MCR 9.107. A respondent may commence original proceedings in the Supreme Court (Complaint for Mandamus) to implement the Court's superintending control power when an application for leave to appeal cannot be filed. MCR 7.304(A).

The respondent also argues that the Michigan attorney discipline system is unconstitutional because it was not created by the Michigan legislature. The respondent claims that the Michigan Constitution prohibits the delegation of judicial power, and, as a result, the Michigan Supreme Court's creation of the Attorney Discipline Board to supervise and discipline attorneys is inherently unconstitutional. A comparable argument was raised by a respondent attorney in Ortman v Thomas, et al., 99 F3d 807 (6th Cir. 1996). In the Ortman case, the plaintiff similarly challenged the constitutionality of the entire attorney discipline system in Michigan, based on an argument that the Michigan Constitution prohibits delegation of judicial powers. The Sixth Circuit held that such an argument was, "patently meritless." Ortman, supra, p 811.

The respondent in this case further contends that the counts as charged in the formal complaint should be quashed and dismissed because his refusal to answer the request for investigation was based on constitutional grounds. The Board, in Grievance Administrator v Charles B. Evans, DP 23/86; 60/86 (ADB 1987), noted that:

> An attorney served with a Request for Investigation or a Formal Complaint is under an obligation to respond. MCR 9.113(A) and MCR 9.115(D). The attorney may refuse to answer a Request for Investigation on expressed constitutional or professional grounds [MCR 9.113(B)(1)] and may elect to assert the grounds for failure to admit, deny or explain the allegations in a Complaint [MCR 9.115 (D)(2)]. The rules promulgated by our Supreme Court do not, however, allow a licensed member of the Bar to ignore his or her duty to answer.

The respondent contends that it is error for the Grievance Administrator to refuse to submit to the hearing panel the constitutional grounds expressed by the respondent with respect to his failure to answer the request for investigation. The Grievance Administrator asserts that it is within the discretion of the Grievance Administrator, as prosecutor, to determine whether a respondent's grounds for failure to answer should be submitted to the hearing panel. The Grievance Administrator cites the permissive language of the court rule in support of his position, "[i]f a respondent refuses to answer under subrule (B)(1)[1], the refusal *may* be submitted to a hearing panel for adjudication." MCR 9.113(B)(3), emphasis added. The Grievance Administrator's assertion regarding the permissive language of MCR 9.113(B)(3) is correct. "However, if the respondent's

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[1] Subrule (B)(1) refers to MCR 9.113(B)(1) which states, "[a] respondent may refuse to answer a request for investigation on expressed constitutional or professional grounds."

constitutional or professional objections are not resolved by a panel order requiring respondent to answer the request for investigation, the respondent is not guilty of a 'failure to answer' within the meaning of MCR 9.104(7)." Grievance Administrator v Phillip A. Gillis, 96-248-GA (ADB 1997). The Board, in Gillis, supra, held:

> The Administrator could have submitted the respondent's refusal to a hearing panel for adjudication as provided in MCR 9.113(B)(3). If the panel had ruled that respondent's refusal was an appropriate exercise of constitutional rights and/or privileges, the Administrator would have been foreclosed from bringing formal charges alleging that respondent had failed to answer. If, on the other hand, the panel determined that respondent's refusal to answer was improper, and respondent did not thereafter answer, then the respondent could have been subject to disciplinary sanction for failure to answer the request for investigation.

In this case, the second count of the formal complaint does charge the respondent with failure to cooperate with the investigation and failure to respond to a lawful demand for information made by the Attorney Grievance Commission. However, the formal complaint does not specifically charge the respondent with failing to answer the request for investigation. Instead, the second count charges that the respondent failed to provide a client file to the Grievance Administrator as requested. The respondent, in his answer to the formal complaint, claims that:

> a duty to respond to a "demand" is not equivalent to a duty to respond to a "request"[2]; a demand demands obedience, and if legal, may be grounds for discipline; a request implies an option; and no semantic juggling or hocus-pocus should be permitted to obscure this difference, or to suggest that the two are equivalent.

For purposes of clarification, the Board notes that the language of MCR 9.113(B)(1) is mandatory and not permissive - "...a respondent *shall* file with the administrator a signed, written answer" to the request for investigation. MCR 9.113(A), emphasis added. Inasmuch as the respondent's failure to answer was based on his attempt to distinguish a "request" from a "demand," his semantic argument is flawed and would not excuse a failure to answer a request for investigation. The Board directs the respondent to the Grievance Administrator's statement[3] that, "[d]espite

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[2] The 'request' in this instance likely refers to the "Request for Investigation" served on the respondent by the Grievance Administrator.

[3] This statement is taken from the Grievance Administrator's 07/16/01 brief in response to the motion for development of a separate record, p 2, ¶ 5.

Respondent's statements to the contrary, Respondent has not been charged anywhere in the Formal Complaint with failing to answer any of the underlying Requests for Investigations involved in this matter." Thus, with respect to the arguments raised by the respondent in regard to MCR 9.113(B), the Board need not reach a conclusion regarding the respondent's failure to answer the request(s) for investigation. The factual determination regarding misconduct charged in the complaint is within the purview of the hearing panel and is not ripe for review by the Board at this juncture.

Respondent argues that the attorney discipline system in Michigan is unconstitutional, and that the Attorney Discipline Board lacks the authority to exercise jurisdiction over him. The Board, relying on precedent set forth by its own Board decisions, the United States District Court for the Eastern District of Michigan, and the United States Court of Appeals for the Sixth Circuit, finds the respondent's arguments to be without merit. The matter will be remanded to Tri-County Hearing Panel #106 for a factual determination regarding misconduct as charged in the formal complaint.

B. Motion for Development of a Separate Record; MCR 9.110 and MCR 9.111

The respondent filed a motion seeking, "the development of a separate record in order to properly present challenges to the Michigan Court Rules for review by the Michigan Supreme Court..." The respondent relies on Justice Levin's dissent in Grievance Administrator v Attorney Discipline Board, 444 Mich 1219; 515 NW2d 360 (1994) in support of his argument. Specifically, the respondent cites the language of Justice Levin's dissent, 515 NW2d 361, internal citations omitted:

> This Court acts administratively in adopting a court rule. Such administrative action by the Court does not foreclose consideration of a challenge "to the wisdom, validity or meaning of a rule when a question is brought to the Court judicially or by a proposal for a change in a rule..."

Respondent has challenged the constitutionality and validity of MCR 9.110(A), MCR 9.110(B), MCR 9.110(D), and MCR 9.111, which defines the authority of the Board, provides for appointment of members to the Board, delineates the internal rules of the Board, and, in MCR 9.111, provides for the appointment of hearing panelists. The respondent's argument that MCR 9.110 and MCR 9.111 are unconstitutional has not previously been addressed with specificity by the Board or the courts. However, the respondent's challenges to the constitutionality of the discipline system, in general, have been the subject of judicial review. The arguments respondent raises in challenging the court rules are essentially the same arguments he raised in challenging the overall constitutionality of the discipline system. The constitutionality of the attorney discipline process in

Michigan, which inherently includes the authority and composition of the Board, the internal rules of the Board, and the function of the hearing panels, has consistently withstood judicial scrutiny. On this basis, the Board declines to hold that the Michigan Court Rules, specifically MCR 9.110(A), MCR 9.110(B), MCR 9.110(D), and MCR 9.111, violate the United States or Michigan Constitutions.

The Board finds the language of MCR 9.110 and MCR 9.111 to be unambiguous. The respondent's arguments do not present the Board with a reason to attempt dissection or construction of those court rules. This posture is supported by the language of the Michigan Supreme Court's opinion in Grievance Administrator v Underwood, 462 Mich 188, 193-194 (2000):

> When called on to construe a court rule, [the Michigan Supreme Court] applies the legal principles that govern the construction and application of statutes. Accordingly, we begin with the plain language of the court rule. When that language is unambiguous, we must enforce the meaning expressed, without further judicial construction or interpretation.

The respondent's argument regarding the constitutionality of the attorney discipline system is preserved in the pleadings, and the respondent is permitted to petition the Michigan Supreme Court for leave to appeal based on the Board's decision in this case. Thus, it is not necessary that a separate record be developed in order for the respondent to be able to present his petition for leave to appeal. Consequently, the respondent's motion for development of a separate record will also be denied.

C. Motion for Hearing Pursuant to MCR 9.113(B)(3)

The respondent moves for a hearing pursuant to MCR 9.113(B)(3), which allows the Grievance Administrator to submit the respondent's constitutional or professional grounds for refusal to answer a request for investigation to a hearing panel for adjudication. However, as previously stated in this opinion, the Grievance Administrator has affirmed that the respondent has not been charged with failure to answer a request for investigation pursuant to MCR 9.113(B)(2).

The respondent has been charged with misconduct for failing to cooperate in an investigation by refusing to provide a client file to the Grievance Administrator. (Formal Complaint, p 4, ¶ 13.) The factual determination of whether the respondent committed the misconduct as charged in the second count of the complaint will be remanded to Tri-County Hearing Panel # 106 for a hearing. Thus, a hearing pursuant to MCR 9.113(B)(3) is not necessary, as the respondent has not been charged with failure to answer a request for investigation. Accordingly, the respondent's motion

will be denied.

D. Motion for Notice to the Michigan Attorney General and the State Bar of Michigan

The respondent's final motion seeks formal notice to the Michigan Attorney General and the State Bar of Michigan:

> that a cause is pending before the Attorney Discipline Board raising issues of whether Chapter 9, Michigan Court Rules, does not invade & usurp the Constitution of 1963, Legislative Act 58 of 1935, as amended, and disciplinary duties & powers assigned to the State Bar of Michigan: invitation to appear and be heard.

Again, the respondent's arguments in support of his challenges to the court rules are, in essence, the same arguments he raises in challenging the constitutionality of the attorney discipline system as a whole, including usurpation of the function of the Michigan Legislature and improper delegation of power by the Michigan Supreme Court. The respondent fails to cite to any authority - statute, court rule, administrative order, or case law - which supports his request for notification of the Michigan Attorney General and/or the State Bar of Michigan.

The Grievance Administrator, in response to this motion, asserts that notice to the Attorney General or the State Bar would be premature at this time because if the hearing panel dismisses the underlying charges of misconduct, the constitutional issues would be moot. The respondent replied to the Grievance Administrator's assertion by arguing that, because his constitutional claims are jurisdictional in nature, they must first be decided before a panel may conduct the hearing on misconduct.

For the reasons previously stated in this opinion, the Board holds that the attorney discipline system in Michigan is constitutional, and that the Attorney Discipline Board may properly exercise jurisdiction over the respondent. In light of the complete paucity of authority or support for the respondent's motion for notice, the Board is not persuaded that notice should be provided to either the Michigan Attorney General or the State Bar of Michigan, or that either party should be invited to appear or to file *amicus* briefs in this matter.

IV. Conclusion

This matter is before the Board on the respondent's motions: to quash and dismiss the formal complaint; for development of a separate record; for a Rule 9.113(B)(3) hearing; and for notice to the Michigan Attorney General and the State Bar of Michigan that a cause is pending before the Attorney Discipline Board which challenges the constitutionality of the attorney discipline system.

For the reasons stated in this opinion, the respondent's motions are denied. The matter will be remanded to Tri-County Hearing Panel #106, and a hearing to determine whether the respondent committed misconduct as charged in the formal complaint will be scheduled forthwith.