STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellant

v

Geoffrey N. Fieger, P-30441,

Respondent/Appellee

94-186-GA

BOARD OPINION

Issued 6/4/96; corrected 6/13/96

The Grievance Administrator ("Administrator") filed a Formal Complaint alleging that respondent made knowingly false or reckless statements about various judges and a county prosecutor in violation of MRPC 8.2(a) and other rules. Respondent filed a motion for summary disposition under MCR 2.116(C)(10) accompanied by a detailed affidavit, which respondent claimed established that there was no genuine issue of material fact as to whether respondent possessed the requisite scienter when he allegedly made the statements. The hearing panel granted the motion because the Administrator did not come forward with evidence to counter respondent's affidavit. We vacate the order granting summary disposition and remand for proceedings consistent with this opinion. For the reasons discussed in this opinion, we conclude that summary disposition under MCR 2.116 may be sought in certain circumstances in discipline matters, but that it was not appropriately granted in this case.

I.

In his motion for summary disposition, respondent argued:

> there is no genuine issue of any material fact as to the following: statements alleged to have been made by Respondent as charged . . . were not made by him with the knowledge that they were false and were not made by him with reckless disregard for their truth or falsity.

In response, the Administrator asserted that the question of respondent's state of mind when making the alleged statements was a question of fact to be determined at a full evidentiary hearing. Respondent countered that because the Administrator failed to provide affidavits or other evidence establishing a genuine issue of fact he is entitled to summary disposition under MCR 2.116(C)(10).[1] The Administrator provided no documentary or other evidence in support of his response to the motion, asserting that he cannot divulge materials which are non-discoverable under MCR 9.115(F)(4).[2]

The hearing panel entered an order granting respondent's motion for summary disposition, without prejudice, and gave the Administrator 14 days to file "an amended response which complies with the requirements of MCR 2.116(C)(10) and MCR 2.116(G)(4)," i.e., to come forward with affidavits or other evidence. The Administrator then filed a complaint for mandamus in the Michigan Supreme Court challenging the panel's order. The Court dismissed the mandamus complaint and directed:

> Should the Grievance Administrator elect to file [a petition for review] with the Attorney Discipline Board, we DIRECT the Board to expeditiously decide the question whether summary disposition may be sought before a hearing panel pursuant to MCR 2.116 and, if the Board finds that summary disposition may be sought, whether it was properly granted in this case. [Grievance Administrator v Tri-County Hearing Panel #75, unpublished order of the Michigan Supreme Court, issued October 4, 1995 (Docket No 103178).]

The Administrator filed a petition for review.

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[1] The respondent also requested judgment under MCR 2.116(C)(8). The panel did not address the (C)(8) motion and the parties agree we should not address it.

[2] MCR 9.115(F)(4) directs that "pretrial or discovery proceedings" are not permitted. The only significant exceptions are the duty to disclose the names and addresses of witnesses who will be called at trial and the duty to allow inspection of documents which will be introduced at trial. MCR 9.115(F)(4)(a), (b).

II.

Although the Court directed the Board to decide the question whether a party may seek summary disposition under MCR 2.116, the Administrator concedes that the scope of our inquiry is much narrower. The Administrator agrees that a hearing panel may consider a motion for summary disposition under MCR 2.116(C)(8) and in certain instances under MCR 2.116(C)(10), acknowledging that a summary disposition motion has the potential to limit the issues in a given case. However, the Administrator argues that MCR 2.116(G)(4) (the requirement on the nonmoving party to come forward with counter affidavits or other evidence) does not apply in its entirety to discipline proceedings because, to the extent it requires the production of evidence, it may conflict with MCR 9.115(F)(4), which limits discovery in discipline cases. The Administrator further argues that he has no power to compel a witness to give an affidavit or obtain other evidence to defeat a motion for summary disposition.

Under MCR 9.115(F)(4), discovery proceedings are not permitted in a discipline case except that the parties may demand: (1) inspection and copying of the documentary evidence that will be introduced at the hearing; and, (2) a list of the names and addresses of the witnesses who will testify at the hearing.[3]

Under MCR 2.116(G)(4), in order to defeat a motion for summary disposition under MCR 2.116(C)(10), the nonmovant must produce evidence establishing a question of fact:

> A motion under subrule [MCR 2.116](C)(10) must specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact. When a motion under subrule (C)(10) is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that

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[3] The "discovery" provisions of Rule 9.115(F)(4) permit de bene esse depositions where live testimony before the panel would be impractical, and not as a "discovery proceeding." See Anonymous v Attorney Grievance Commission, 430 Mich 241, 253 (1988).

> there is a genuine issue for trial. If the adverse party does not so respond, judgment, if appropriate, shall be entered against him or her. [Emphasis added.]

The Administrator does not resist producing evidence in response to a motion for summary disposition so long as the production of evidence does not result in the disclosure of materials not required to be exchanged under MCR 9.115(F)(4).

Respondent argues that summary disposition proceedings are not discovery proceedings and therefore the Administrator may be compelled to produce evidence beyond the scope of MCR 9.115(F)(4) in response to a motion for summary disposition.

Thus, the question before us is: must a party responding to a motion for summary disposition under MCR 2.116(C)(10) in a discipline proceeding be required to comply with MCR 2.116(G)(4) if doing so would require the production of an affidavit or documentary evidence which the party would not otherwise have to disclose under MCR 9.115(F)(4)?

III.

This Board interprets the Supreme Court's intent in adopting the rules which govern discipline proceedings. At issue is the tension between rules contained in the general civil court rules (regarding summary disposition) and the rules applicable to discipline proceedings (limiting discovery). MCR 9.115(A) provides that "except as otherwise provided" in subchapter 9.100, the rules concerning practice and procedure in nonjury civil actions apply in disciplinary matters. In practice and in reality, the rules which govern many pretrial and post-trial procedures commonly utilized in a civil proceeding are simply not compatible with a discipline proceeding before a hearing panel.

We agree with respondent that summary disposition proceedings are not discovery proceedings. However, that does not mean that MCR 2.116 is applicable or that compliance with the rule does not in effect require discovery.

Summary disposition under MCR 2.116(C)(10) contemplates "discovery" of the type which is inherent in civil practice and,

for the most part, the rule only works in such a setting. Civil litigants have the ability to compel depositions and production of documents which are the food for responding to (and defeating) motions for summary disposition. Litigants in discipline proceedings have no power to obtain such material. While the Administrator has broad investigatory power, he has no power after filing the formal complaint to compel a deposition or the production of documents other than at the hearing (i.e., trial). Self-serving affidavits (prepared by lawyers) should not be used to establish the absence of a genuine issue of material fact unless the responding party has the opportunity (and does not take advantage of the opportunity) to depose and cross examine the affiant or other witnesses (an opportunity given in civil litigation, but not in disciplinary proceedings).[4] We do not believe the Court intended that these proceedings devolve into a war of affidavits prior to or obviating a hearing on the merits, where witnesses become subject to cross examination.

Contrary to the dissent's position, the issue is not whether the disciplinary rules prohibit disclosure of information. Regardless whether the rules prohibit disclosure, the Court has made clear that we cannot compel disclosure. Our agreement with respondent that summary disposition is not discovery does not mean that respondent may obtain what is otherwise nondiscoverable under the guise of a motion for summary disposition. We must read the rules (MCR 9.115(A) and 9.115(F)(4)) together, avoiding conflict if possible. Brown v Manistee County Rd Comm'n, 204 Mich App 574, 577; 516 NW2d 121 (1994), lv gtd 449 Mich 860 (1995). MCR 9.115(A)

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[4] The dissent takes issue with our focus on the Court's intent and reads MCR 9.115(A) in a vacuum without regard to MCR 9.115(F)(4) or the realities of the discipline process. We believe the better approach is to review the overall system and procedures rather than to make an isolated examination of a single rule which does not fit in a system where there is virtually no discovery.

The dissent also points out that summary disposition under MCR 2.116(C)(10) is available in district court where there is no discovery as a matter of right. However, the dissent fails to recognize the importance of the fact that discovery is available in district court cases by leave -- an opportunity unavailable to discipline litigants. Certainly, a district court, faced with an argument from the nonmoving party that discovery is necessary for the response, would properly exercise its discretion to grant such discovery.

states that the general civil court rules apply only to the extent that the discipline rules do not provide otherwise. By limiting the materials that must be disclosed, the disciplinary rules provide "otherwise" than the civil rules and thus there is no inconsistency.

In addition, if there is conflict, the more specific rule should control. Id. By subjecting the Administrator to MCR 2.116(G)(4), the dissenter (and the respondent) would not only compel disclosure, but compel the Administrator to produce evidence which the more specific and controlling rule says he cannot be compelled to produce. Grievance Administrator v Attorney Discipline Board, 444 Mich 1218 (1994).[5]

The dissenter and the respondent would also require the Administrator to seek to obtain information and/or an affidavit which he has no power to obtain.[6]

We agree with the dissent that summary disposition under MCR 2.116(C)(10) often streamlines issues and contributes to the speedy resolution of cases (which could include discipline cases). However, summary disposition under (C)(10) is only workable where discovery is part of the process. In that vein, we are not stating or implying that limited discovery is inadvisable or inappropriate in discipline matters. Indeed, most jurisdictions provide for discovery. See Mogill, Discovery & Disclosure in Attorney Discipline Cases, 74 MBJ No 9, p 898 (September 1995). However, our reading of the court rules and Supreme Court pronouncements leads us to conclude that MCR 2.116(G)(4) is generally inoperative

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[5] The dissent suggests that the Supreme Court's order in Grievance Administrator v Attorney Discipline Board, ("Discovery Case") should not be read to preclude a requirement that the Administrator produce non-discoverable evidence because the Court meant to ensure speedy hearings and civil discovery proceedings may conflict wit that goal. However, this Board's opinion in the Discovery Case did not authorize civil discovery proceedings, but only the disclosure of information already in the Administrator's file. Nevertheless, the Supreme Court vacated this Board's order. Indeed, the disclosure under the Board's opinion in the Discovery Case would be far less time consuming than the production required by the dissent in this case, which would force the Administrator to engage in further information gathering.

[6] Pointing to vehicles which the Administrator could rely on if unable to obtain an affidavit (MCR 2.116(H)) does not answer the question of whether the Supreme Court meant to require the Administrator to seek the affidavit in the first place (when the Administrator cannot compel a deposition).

in a discipline proceeding when compliance would require the respondent or the Administrator to provide an affidavit or documentary evidence which the party would not otherwise be required to furnish to the opposing party under MCR 9.115(F)(4).[7]

IV.

Even if the rules contemplate affidavit wars, summary disposition would be inappropriate in this case. The central question in respondent's motion is whether the alleged statements were knowingly false or were made with reckless disregard of their truth or falsity.

There are differing viewpoints among courts dealing with this intent issue in First Amendment libel cases. After considering these cases in light of the procedure applicable to discipline matters, we conclude that summary disposition as to the question whether this respondent possessed the requisite scienter is not appropriate.

Assuming summary disposition motions with supporting affidavits are proper, hearing panels must enforce the requirement that subrule (C)(10) motions be properly "made and supported." MCR 2.116(G)(4). Panels should not burden the nonmovant with responding to motions which amount to nothing more than fishing expeditions, or allow the proceeding to be unnecessarily lengthened by summary disposition motions. The purpose of these proceedings is the protection of the public, courts and profession, not simply the resolution of a private dispute. Hearing panels should be cognizant of the purpose of these proceedings and reach the determination that there exists no genuine issue of material fact only after the most careful consideration.

> To determine if a genuine issue of material fact exists the test is "whether the kind of record which might be developed, giving the benefit of reasonable doubt to the opposing party, would leave

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[7] We leave open the possibility that in an unusual case, the Administrator may be required to come forward with otherwise non-discoverable evidence in response to a motion for summary disposition under MCR 2.116(C)(10). This is not such a case and we have not yet been presented with such a case.

> open an issue upon which reasonable minds might differ." [Skinner v Square D Co, 445 Mich 153, 162; 516 NW2d 475 (1994) (citation omitted).]

In this case, each of the three counts in the formal complaint allege a violation of MRPC 8.2(a), which provides:

> A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicative officer, or public legal officer, or of a candidate for election or appointment to judicial or legal office.

Under New York Times v Sullivan 376 US 254; 84 S Ct 710; 11 L Ed 2d 686 (1964), a person may not be held civilly or criminally liable for defamatory statements unless the statements were made with "actual malice," i.e., unless the person made "a false statement . . . with knowledge that it was false or with reckless disregard of whether it was false or not." Garrison v Louisiana, 379 US 64, 67; 85 S Ct 209, 212; 13 L Ed 2d 125 (1964) (overturning criminal libel conviction of district attorney for disparaging comments regarding 8 judges).

According to a leading commentator,[8] "Rule 8.2(a) incorporates the First Amendment standard for criticism of public officials, as articulated by the Supreme Court in New York Times v Sullivan and its progeny."[9] Although other rule violations are alleged against respondent, the Administrator appears to concede that discipline may only be based on statements regarding the integrity or qualifications of persons denominated in MRPC 8.2(a) if the scienter requirement of that rule, which is to say the actual

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[8] Geoffrey C. Hazard, Jr., who served as Reporter for the American Bar Association Special Commission on Evaluation of Professional Standards (Kutak Commission), which proposed to the ABA House of Delegates what eventually became the Model Rules of Professional Conduct.

[9] Hazard & Hodes, The Law of Lawyering (2d ed), §8.2:201, p 934. Although a literal reading of the second prong of the rule (proscribing statement made "with reckless disregard as to its truth or falsity,") may suggest that recklessness is disciplinable regardless of falsity, the commentators agree that "Rule 8.2(a) is limited to matters of fact that can be proven false, as is the case with libel and slander." Id.; see also Wolfram, Modern Legal Ethics, p 601 n 51, p 602 n 54.

malice standard of New York Times v Sullivan, is established. This is a proper concession. The rules of professional conduct are subject to the First Amendment. Moreover, if a specific rule governs the alleged conduct, its terms should take precedence over those of a more general rule.

Following the United States Supreme Court's decision in New York Times v Sullivan, federal courts showed a willingness to entertain and grant summary judgment on the actual malice issue. See, e.g., Washington Post Co v Keogh, 365 F2d 965 (CA DC, 1966), cert den 385 US 1011 (1967) (noting the chilling effect of pending litigation on First Amendment freedoms). Such cases essentially established an exception to the general admonition against granting summary judgment where intent is at issue.

In Hutchinson v Proxmire, 443 US 118, 120 n 9; 99 S Ct 2675, 2680 n 9; 61 L Ed 2d 411 (1979), the United States Supreme Court stated that "the proof of 'actual malice' calls a defendant's state of mind into question . . . and does not readily lend itself to summary disposition." The Court felt "constrained to express some doubt about" the trend favoring summary judgment in these cases, but went no further "because the propriety of dealing with such complex issues by summary judgment [was] not before [the Court]." Id.

The question was squarely presented and addressed in Anderson v Liberty Lobby, 477 US 242; 106 S Ct 2505; 91 L Ed 2d 202 (1986). There, the Court minimized its statements in Hutchinson while upholding the propriety of summary judgment in cases involving "actual malice." 477 US at 255 n 7; 106 S Ct at 2514 n 7. The Court also held that "in ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden." Anderson, 477 US at 254; 106 S Ct at 2513. In other words, the court must take into account the "clear and convincing" standard of proof mandated by the First Amendment[10] in actual malice cases.

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[10] Anderson, 477 US at 244, 252; 106 S Ct at 2508, 2512; Gertz v Robert Welch, Inc, 418 US 323, 342; 94 S Ct 2997, 3008; 41 L Ed2d 789 (1974).

Finally, the Court explained that its holding

> by no means authorizes trial on affidavits. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . . The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. [citation omitted.] Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial. [Citation omitted.] [Anderson, 477 US at 255; 106 S Ct at 2513-2514.]

Michigan decisions reflect the same general philosophical divide found in federal cases. In Hayes v Booth Newspapers, Inc, 97 Mich App 758, 774-775; 295 NW2d 858 (1980), the Court of Appeals articulated the view that "[s]ummary judgment is an integral part of the constitutional protections afforded defendants [in cases requiring proof of actual malice]."[11] Yet, more recently, in Peterfish v Frantz, 168 Mich App 43, 53; 424 NW2d 25 (1988), the Court said:

> [A] plaintiff should be given ample opportunity to demonstrate actual malice, with the trial courts being reluctant to prevent the issue from going to the jury. Grostick v Ellsworth, 158 Mich App 18, 23; 404 NW2d 685 (1987), lv den 429 Mich 861 (1987).

Michigan courts generally hold that summary disposition is inappropriate where motive and intent predominate or when credibility is crucial. See, e.g., Durant v Stahlin, 375 Mich 628, 647-651; 135 NW2d 392 (1965) (concurring opinion of Justice

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[11] It has been argued that Michigan courts favor summary judgment in cases involving New York Times actual malice. Rassel, Stewart, & Niehoff, Michigan Law of Defamation, 1994 Detroit College of Law Review 61, 113 n 293 and accompanying text (citing cases relying on Hayes or other decisions urging more vigorous application of summary judgment in actual malice cases). However, the Supreme Court has clarified that the First Amendment does not compel special summary judgment rules in actual malice cases. Anderson, 477 US at 256 n 7; 106 S Ct at 2514 n 7, citing Calder v Jones, 465 US 783, 790-791; 104 S Ct 1482, 1487-1488; 79 L Ed 2d 804 (1984).

Souris); SSC Associates Ltd Partnership v Detroit Retirement System, 192 Mich App 360, 365; 480 NW2d 275 (1991).

The experiences of federal and state courts in dealing with this specific question are helpful to a certain degree, but procedural differences between those proceedings and these should be taken into account. One such difference is the presence of extensive discovery, particularly depositions, in federal and state courts. A well-known treatise on federal practice illustrates the necessity of full discovery before summary judgment in these types of cases:

> Since the information relating to state of mind generally is within the exclusive knowledge of one of the litigants and can be evaluated only on the basis of circumstantial evidence, the other parties normally should have an opportunity to engage in discovery before a summary judgment is rendered. But even this may not be enough. Inasmuch as a determination of someone's state of mind usually entails the drawing of factual inferences as to which reasonable men might differ -- a function traditionally left to the jury -- summary judgment often will be an inappropriate means of resolving an issue of this character. [10A Wright, Miller & Kane, Federal Practice & Procedure, §2730, p 238.]

See also, 4 Rotunda & Nowak, Treatise on Constitutional Law (2d ed), §20.33, p 205 ("If the affidavits after full discovery show no genuine issue for the jury [in cases involving actual malice], the defendant should not be put through the burden of a full trial"; emphasis in original); Anderson, supra, 477 US at 245; 106 S Ct at 2508 ("Following discovery, the petitioners moved for summary judgment pursuant to Rule 56.").

Finally, since these proceedings are designed to be summary in nature, proceeding to trial may be at times the least onerous thing to do. As a noted commentator on the Federal Rules of Civil Procedure has said:

> [D]istrict courts should not allow the summary judgment procedure to be used in such a manner that almost as much expense and effort is incurred in demonstrating that summary judgment should be denied and that the case

> should go to trial as the expense and effort involved in the actual trial. [6 Moore's Federal Practice (2d ed), ¶ 56.16, p 56-346.]

We conclude that summary disposition under MCR 2.116(C)(10) as to the question whether respondent made the alleged statements with actual malice is not appropriate in this case. If respondent's intent becomes the dispositive issue in this case, we conclude that a full hearing is the appropriate and necessary means for the panel to decide the question.

Accordingly, we vacate the panel's order granting summary disposition and remand for further proceedings, which may include additional proceedings under MCR 2.116(C)(8).

Board Members C. Beth DunCombe, Marie Farrell-Donaldson, Elaine Fieldman, Barbara B. Gattorn, Miles A. Hurwitz, and Michael R. Kramer concur.

George E. Bushnell, Jr. (concurring in part and dissenting in part).

I agree with the majority that the hearing panel's order must be vacated because summary disposition as to the question whether respondent made the alleged utterances with actual malice is not appropriate. However, I dissent from that portion of the opinion which holds that

> MCR 2.116(G)(4) is generally inoperative in a discipline proceeding when compliance would require the respondent or the Administrator to provide an affidavit or documentary evidence which the party would not otherwise be required to furnish to the opposing party under MRC 9.115(F)(4).

It is submitted that the majority has incorrectly framed the issue. MCR 9.115(A) unambiguously provides that the rules of practice and procedure governing a nonjury civil matter apply to panel proceedings "[e]xcept as otherwise provided in [subchapter 9.100]." Recognizing this, the Administrator argues that there is

a "conflict" between portions of MCR 2.116 and subchapter 9.100. My colleagues apparently perceive this to be a weak argument because they bolster it with the conclusion that summary judgment[1] motions violate the Court's intent in adopting subchapter 9.100. It is not the function of the Attorney Discipline Board to determine the "legislative intent" of the Court in promulgating the Michigan Court Rules. Rather, the Board may only look to rules as stated, which rules give no evidence that dispositive motions are outlawed in disciplinary cases.

Because discipline cases proceed more expeditiously than ordinary civil litigation, limits on the type and duration of discovery are common. See, e.g., Rule 15, of the ABA's Model Rules for Lawyer Disciplinary Enforcement (MRLDE).[2] Like MRLDE 15 C, Michigan's rule provides that civil discovery rules are not applicable to disciplinary cases.

As the majority correctly notes, "discovery proceedings" in disciplinary cases are limited to the inspection and copying of the documentary evidence that will be introduced at the discipline hearing, and an exchange of witness lists. MCR 9.115(F)(4).

The Administrator argues that "[t]he court rule governing summary disposition in civil actions [cannot] modify the discovery limitations of MCR 9.115(F)(4) . . ." (emphasis added).

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[1] Summary disposition pursuant to MCR 2.116(C)(10) will occasionally be referred to as "summary judgment."

[2] That rule provides in part:

> **A. Scope.** Within [twenty] days following the filing of an answer, disciplinary counsel and respondent shall exchange the names and addresses of all persons having knowledge of relevant facts. Within [sixty] days following the filing of an answer, disciplinary counsel and the respondent may take depositions in accordance with [appropriate state rule of civil procedure], and shall comply with reasonable requests for (1) non-privileged information and evidence relevant to the charges or the respondent, and (2) other material upon good cause shown to the chair of the hearing committee [board].
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> **B. Resolution of Disputes.** . . .
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> **C. Civil Rules Not Applicable.** Proceedings under these rules are not subject to the [state rules of civil procedure] regarding discovery except those relating to depositions and subpoenas.

The Administrator then concludes that:

> Hearing panels simply lack the authority to require affidavits or other evidence within the scope of MCR 2.116(G)(4), and the Commission cannot be required to disclose the findings of its investigation prior to the disciplinary hearing.

The Administrator's argument is premised on the assumption that MCR 9.115(F)(4) prohibits the exchange of evidence prior to trial. It does not. The rule provides that "pretrial or discovery proceedings are not permitted except as follows . . ." (emphasis added). It does not say that "disclosure of evidence which may be introduced at trial shall not be exchanged in the context of formal discovery, a motion for summary disposition or otherwise, except as follows . . . ." Indeed, it would be difficult to develop a rationale for such an unprecedented rule.

Formal discovery is limited in discipline proceedings to promote the speedy resolution of these cases. The exchange of information prior to trial is entirely consistent with this goal. See, e.g., comment to MRLDE 15 (providing for limited discovery):

> Liberal exchanges of non-privileged information should be encouraged since they facilitate the trial of the charges. However, because a skillful advocate can convert unlimited discovery into a tool for delay the time for discovery should be limited.

If the Supreme Court had determined to prohibit all disclosure of evidence, there would be no MCR 9.126(D) which provides that otherwise confidential files and records of the Grievance Administrator or the Commission may be examined by or disclosed to:

> (3) the respondent as provided under MCR 9.115(F)(4),
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> (4) members of hearing panels or the board,
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> * * *
>
> (7) other persons who are expressly authorized by the board or the Supreme Court.

MCR 9.126(D) continues:

> If a disclosure is made to the Supreme Court, the board, or a hearing panel, the information must also be disclosed to the respondent.

As MCR 9.126(D) makes clear, a hearing panel and this Board may examine investigative files and records that are not subject to the discovery provisions of MCR 9.115(F)(4). Materials disclosed to a panel or this Board shall be disclosed to the respondent. This allows for the typical procedure for briefing and arguing a motion under MCR 2.116(C)(10): the movant identifies the issue she or he claims is not subject to reasonable dispute; the nonmovant responds with some evidence and argument that a genuine issue exists for trial; and, the movant usually replies that the evidence is insufficient to raise a genuine issue of material fact, and that he or she is entitled to judgment as a matter of law.

I am also not persuaded by the Administrator's argument that summary disposition proceedings would conflict with MCR 9.102(A), which provides that procedures under subchapter 9.100 "must be as expeditious as possible." Summary disposition has been widely recognized as a useful mechanism to avoid the delay and expense associated with full trial in appropriate instances. In Celotex Corp v Catrett, 477 US 317, 327; 106 S Ct 2548, 2555; 91 L Ed 2d 265 (1986), the United States Supreme Court offered the following observations with respect to MCR 2.116(C)(10)'s federal counterpart, FR Civ P 56:

> The Federal Rules of Civil Procedure have for almost 50 years authorized motions for summary judgment upon proper showing of the lack of a genuine, triable issue of material fact. Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just, speedy and inexpensive determination of every action." Fed. Rule Civ. Proc. 1 [other citations omitted].

Summary disposition is available not only in circuit and federal courts, but also in forums intended to have somewhat more

streamlined procedures. For example, although MCR 2.302(A)(2) limits discovery in district courts,[3] summary disposition procedures are available by virtue of MCR 4.001 and are routinely used in such courts. Also, summary disposition has been approved in administrative matters. See Smith v Lansing School Dist, 428 Mich 248; 406 NW2d 825 (1987) (summary disposition for failure state a claim held appropriate in proceedings conducted under the Administrative Procedures Act). In American Community Ins Co v Commissioner of Insurance, 195 Mich App 351, 362; 491 NW2d 597 (1992), the Court of Appeals applied an agency rule similar to MCR 2.116(C)(10), stating:

> In [Smith, supra,] the Supreme Court held that summary disposition rules were appropriate in administrative proceedings, and that [the APA] did not mandate an evidentiary hearing when the material facts were not at issue.

The Administrator also raises the concern that he has no authority to compel a witness to give an affidavit after a motion for summary disposition has been filed. This concern would be justified in the rare instance where an affidavit from an uncooperative witness is the only type of proof contemplated by MCR 2.116(G)(4) which could serve to raise a genuine issue of material fact. However, the summary disposition rule contemplates such circumstances. In the event that the Administrator encounters such a critical and recalcitrant witness, he may avail himself of the procedures in MCR 2.116(H). The hearing panel can, and should, afford the Administrator a certain degree of latitude under this rule, particularly in light of the fact that these proceedings are conducted for the protection of the public, the courts, and the legal profession. MCR 9.102(A); MCR 9.105.

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[3]MCR 2.302(A)(2) provides:

> In actions in the district court, no discovery is permitted before entry of judgment except by leave of the court or on the stipulation of all parties. A motion for discovery may not be filed unless the discovery sought has previously been requested and refused.

Finally, the Administrator argues that

> a ruling that MCR 2.116(G)(4) applies in disciplinary proceedings will open the floodgates to [(C)(10)] motions by those respondents who see it as a way to obtain discovery expressly prohibited by MCR 9.115(F)(4). Thus there will be motions for summary disposition filed in just about every case.

Again, MCR 9.115(F)(4) restricts discovery proceedings, not the disclosure or exchange of evidence. The pretrial examination of evidence in the context of a dispositive motion does not constitute a discovery proceeding. There is no intrinsic harm in the pretrial exchange of evidence. While one must take seriously the concern that nonmeritorious motions might burden the petitioner and the panels and otherwise delay proceeedings, the suggestion that many cases will lend themselves to such maneuvering is speculative at best. Wise advocates will be wary of alienating a panel with baseless motions.

Moreover, since all documentary evidence to be introduced by the parties must be exchanged in discovery, MCR 9.115(F)(4), it will be rare, indeed, that documentary evidence relied upon to oppose a motion will not be exchanged under this rule. A possible exception may exist where a party actually has a legitimate basis for filing the motion which causes the nonmovant to evaluate the evidence in his or her possession and conclude that more is needed. In that case, the nonmovant has a chance to assemble the evidence before trial. If there is no such evidence, the matter should not proceed.

As to nondocumentary evidence, there is ample caselaw establishing that summary disposition is generally inappropriate where intent is at issue, or where credibility and demeanor are crucial. Panels will recognize that trial by affidavit is as inappropriate in these proceedings as it would be in any other forum. It is doubtful that summary judgment would -- or should -- be often granted in these proceedings, and I agree with the majority's alternative holding that hearing panels should promptly deny unfounded motions with minimal expenditure of the parties' and

the panel's resources.[4] My fundamental disagreement with the majority is over whether summary judgment is available in disciplinary cases.

The majority concludes that the traditional proof-testing function of summary judgment is inconsistent with these proceedings. However, MCR 2.116(C)(10) and (G)(4) are not truly at odds with subchapter 9.100 -- even where a party may be required to obtain an affidavit from a key witness to establish the existence of an issue of fact. The majority falls into the same logical trap which plagues the Administrator. Both err by concluding that a rule limiting discovery proceedings precludes the pretrial exchange of evidence in all contexts.

Grievance Administrator v Attorney Discipline Board, 444 Mich 1218 (1994), cited by the majority, is inapposite. That case arose from several discipline matters in which respondents requested evidence not required to be exchanged under MCR 9.115(F)(4) on the basis that due process or fundamental fairness required it. In a one-paragraph order, the Supreme Court vacated the Board's order requiring disclosure of various materials. What is learned from that order is that any perceived problems with MCR 9.115(F)(4) must be cured by amendment and not by Board orders denominating the rule fundamentally unfair. Nothing in the Court's order prohibited the exchange of evidence on a voluntary basis or in the context of a summary disposition motion.

In order for the nonmovant to be subject to a duty to demonstrate the existence of a genuine issue of material fact, a motion must be "made and supported as provided in [MCR 2.116(G)(4)]." SSC Associates Ltd Partnership v Detroit Retirement System, 192 Mich App 360, 367; 480 NW2d 275 (1991). Any motions

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[4] Panels have a certain amount of discretion to deny a dispositive motion. Anderson v Liberty Lobby, 477 US 247, 255; 106 S Ct at 2513-2514; 91 L Ed 2d 202 (1986). That discretion should be exercised to assure that these proceedings are as expeditious and efficient as possible, and that the public, courts and profession are protected. Also, the Supreme Court retains the ultimate responsibility for discipline of attorneys. Const 1963, art 6, §5; Grievance Administrator v August, 438 Mich 296, 304; 475 NW2d 256 (1991). Thus, panels should consider whether a hearing would facilitate review by this Board and the Court. But none of this should excuse a party from making every effort to comply with MCR 2.116(G)(4) upon the filing of a well-grounded motion.

filed only for "discovery" purposes may be quickly disposed of under this rule or the panel's authority to deny motions (discussed elsewhere in this opinion and that of the majority). Furthermore, the existence of a speculative potential for abuse does not justify the total elimination of a legitimate procedure for the prompt resolution of cases. Finally, if a movant (which may often be the Administrator) learns something through a meritorious but ultimately unsuccessful motion, it does not mean that MCR 9.115(F)(4) or Grievance Administrator v Attorney Discipline Board, supra, have been "violated." It is nonsensical to suggest that the purpose of these rules is to prohibit the parties from learning about their opponent's case at all costs.

As to the argument that summary disposition motions under MCR 2.116(C)(10) do not fit within disciplinary procedure because of the limited discovery available, I am not persuaded that the "fit" is all that bad or that it compels us to jettison or cripple the summary disposition process. Summary judgment is available in district courts although discovery may not be. And, even in circuit court, summary disposition may be granted before the completion of discovery if further discovery does not stand a reasonable chance of uncovering factual support for the opposing party's position. Prysak v R L Polk Co, 193 Mich App 1, 1; 483 NW2d 629 (1992). Thus, unlimited discovery and summary disposition do not always go hand-in-hand. Further, if summary disposition in a particular case would be inappropriate because of the limited discovery in these proceedings, it may be denied for this very reason.

It is true that these proceedings do not exactly mirror circuit court proceedings. Some interpolation is required in applying the civil rules. But, the unmistakable injunction of MCR 9.115(A) is that the civil rules apply unless subchapter 9.100 otherwise provides. Stated in more practical terms, we can either try to make the cart go, or we can try to make the wheels fall off. All of the problems with summary judgment identified by the Administrator and the majority may be cured with the judicious

application of standards found in the rule, published decisions, and the opinions of this Board.[5]

The Administrator concedes that a subrule (C)(10) motion is appropriate so long as a party is not required to demonstrate the existence of a genuine issue of fact for trial with something not required to be exchanged under MCR 9.115(F)(4). Not only does this reasoning confuse procedure with substance, it flies in the face of the intent behind MCR 2.116(C)(10) and subchapter 9.100. Panels "may order a prehearing conference" to "obtain admissions or otherwise narrow the issues presented by the pleadings." MCR 9.115(F)(4)(d). The Court's rule is not an empty gesture. The panels should, and do, have the power to "pierce the pleadings and assess the proof in order to see whether there is a genuine issue for trial."[6] It is submitted that the majority approach will frustrate the function of MCR 2.116(C)(10).

In summary, it is concluded that MCR 2.116(C)(10) and its related subrules apply to attorney discipline proceedings. To avoid excessive delay, MCR 9.115 expressly provides that the parties to a discipline proceeding may not conduct the extensive discovery allowed in subchapter 2.300. MCR 9.115(F)(4). But, the summary disposition rule is not similarly displaced. Rather, MCR 9.115, by its incorporation of "the rules governing practice and procedure in a nonjury civil action," empowers a hearing panel to determine whether there exists a genuine issue of fact for trial and to otherwise proceed under MCR 2.116 upon the filing of a properly supported motion for summary disposition. MCR 9.115(A); MCR 2.116. This is designed to avoid plainly unnecessary hearings

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[5] In footnote 7 of its opinion, the majority attempts "to leave open the possibility that in an unusual case, the Administrator may be required to come forward with otherwise non-discoverable evidence in response to a motion for summary disposition . . . ." If we are to ascertain the Court's intent, and if the majority concludes that the Court intended MCR 9.115(F)(4) to limit the application of MCR 2.116 then the majority cannot at some later point discard this conclusion. Either MCR 2.116(G)(4) applies to these proceedings or it does not. If it applies, we may apply it in a fashion consistent with the aims of these proceedings. But if we hold that it does not apply (or that it is generally inoperative when it requires the production of "nondiscoverable" evidence), that door is closed. There is no logical way to leave it ajar.

[6] Advisory Committee Note to Fed R Civ P 56 (1963 amendment).

and is consistent with the panel's power to conduct a prehearing conference "to obtain admissions or otherwise narrow the issues presented by the pleadings," MCR 9.115(F)(4), which can also facilitate the efficient disposition of disciplinary matters.

I would hold that when a party to a disciplinary proceeding fails to respond to a dispositive motion brought under MCR 2.116(C)(10) with evidence sufficient to create a genuine issue of material fact, a hearing panel may grant summary disposition "if appropriate." MCR 2.116(G)(4) (emphasis added).

As suggested above, summary disposition is not appropriate in the matter at bar. The issues to be determined are respondent's state of mind and respondent's First Amendment rights. To be more direct, this is a case of: "I did not." "You did too." "No, I didn't." "Yes, you did." In divining the answers to these classic questions, the panel's attention is respectfully directed to In Re Turner, 21 Mich App 40; 174 NW2d 895 (1969), and People v Kurz, 35 Mich App 643; 192 NW2d 594 (1971), lv den 387 Mich 756 (1972). Though not in point, the discussions may well be helpful.

Board Member Albert L. Holtz did not participate.