STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellee,

v

Richard L. Austin, P-24201,

Respondent/Appellant,

Case No. 99-12-GA

Decided: May 10, 2001

BOARD OPINION

Respondent represented Flint Township in a drunk driving prosecution against a female defendant, Cherie Worden. The hearing panel dismissed the charges that respondent engaged in a conflict of interest and in prosecutorial misconduct. The panel did, however, conclude that respondent engaged in professional misconduct by pursuing a consensual sexual relationship with Ms. Worden while representing the township. The panel found a violation of MCR 9.104(2) & (3) and imposed a reprimand.

During the panel proceedings, the Grievance Administrator was unable to obtain the attendance of Ms. Worden and sought to introduce the transcripts of her discovery deposition taken during her civil suit against respondent. Counsel for the Administrator repeatedly proffered the deposition transcripts under MRE 804(b)(5). The panel ruled that the deposition testimony was inadmissable in lieu of her live testimony because of the differing motives of the questioners in the two proceedings. The Grievance Administrator petitioned for review, arguing that he "was improperly denied the use of Ms. Worden's prior testimony to prove the allegations set forth in Paragraphs 25(a), (b), and (d) of the Amended Formal Complaint." Petitioner's brief, p 8. These are the allegations pertaining to the claimed prosecutorial misconduct in violation of MRPC 3.8(b).[1]

Before addressing the Administrator's argument, we consider some preliminary issues raised by respondent. In a motion to strike or dismiss the Administrator's petition for review, respondent argues that the Administrator has attempted to improperly expand the record on appeal and prejudice this Board by attaching the excluded deposition testimony to the brief on review. We disagree. This Board and the hearing panels are not juries. We can, and indeed often must, look at potentially inadmissible evidence in order to evaluate the evidentiary rulings of a panel. See, e.g., MRE 103. Respondent also argues that the Administrator failed to preserve the issue of the exclusion of the

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[1] Petitioner has not raised the issue of the panel's dismissal of paragraph 25(c)'s allegations that respondent continued to represent the township "even after his own personal interests in obtaining Ms. Worden's consent to a sexual encounter placed him in a conflict of interest with his client." Accordingly, we do not reach the question whether the facts of this case establish a violation of MRPC 1.7(b) and 1.16(a)(1).

Worden testimony for review. In fact, counsel for the Administrator did so by, among other things, renewing his motion to admit Ms. Worden's civil testimony just prior to resting his case. Tr, p 345. The panel understood that "Petitioner did not waive the right to seek appellate review of the denial of the motion to admit the deposition testimony of Cherie Worden." Panel Report (on misconduct), p 3. We conclude that the issue is preserved. MRE 103(a)(2).

This case deals with an exception to the general rule that hearsay[2] is inadmissible. Michigan Rule of Evidence 804(b)(5) provides an exception for:

> Testimony given as a witness in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

The panel concluded that Ms. Worden's deposition testimony should not be admitted because it was not convinced that respondent's motive to develop her testimony in the civil case was the same as it would be in the discipline hearing. Of course, the motives need only be similar, not precisely the same. The panel appropriately cited Shields v Reddo, 432 Mich 761, 783 (1989). In addition to Shields, one might also cite the following Michigan treatise to support the panel's analysis:

> When a deposition is noticed "for discovery purposes only," a party may intentionally refrain from fully developing the testimony. The party taking the deposition may simply wish to probe expected testimony without disclosing the party's strategy for attacking the testimony on cross-examination. In such circumstances, the examining party does not have a similar motive to develop the testimony as would be the case at trial and the court may well exclude the deposition on that ground. Regardless of how the deposition was noticed, however, the court should focus on whether the opponent had a motive to develop the testimony similar to that at trial. [3 Robinson, Longhofer & Ankers, *Michigan Court Rules Practice, Evidence* (1996), p 236. Footnotes omitted.]

After reviewing the panel's thoughtful and comprehensive opinion, we find it somewhat difficult to determine whether the panel was making a generalized (possibly legal) conclusion that depositions are almost always the product of different motives, rather than making a particularized finding as to the motives in this case. We have concluded that such a finding should be made after review of the transcript so that the panel can more completely assess the motives of the examiner. This is not to suggest, however, that the transcripts are the only, or even necessarily the most important, evidence of motive. Moreover, the panel is free to again exclude the testimony of Ms.

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[2] "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c).

Worden, and we are mindful of the panel's belief – formed after exposure to some of the substance of the testimony – that admission of the transcripts would not likely affect the disposition of the case. Nonetheless, we conclude that the panel should consider them.

We appreciate the panel's apparent concern for preserving its objectivity. However, we trust hearing panels to disregard inadmissible evidence they have seen or heard, just as judges are obligated to do so when such exposure occurs in bench trials.

Accordingly, we remand this matter to the panel for it to consider the question of the admissibility of the transcripts under MRE 804(b)(5) after reviewing them, and to write a supplemental opinion discussing whether the transcripts should be admitted, and, if so, whether that changes the result the panel earlier reached with regard to paragraphs 25(a), (b) and (d) of the amended formal complaint, and any necessary findings and conclusions as to these allegations. The panel may, in its discretion, conduct such further proceedings it deems necessary, if any. If the panel admits the testimony and finds misconduct, it shall conduct a hearing on discipline pursuant to MCR 9.115(J)(2). We do not retain jurisdiction.

In remanding this matter, we emphasize that we express no opinion as to: (1) the admissibility of the deposition testimony; (2) the weight the panel should give that testimony if the panel decides to admit it; or (3) the merits of the prosecutorial misconduct claims set forth in the amended formal complaint.

Board members Wallace D. Riley, Theodore J. St. Antoine, Michael R. Kramer, Nancy Wonch, and Grant J. Gruel concur in this decision.

Board member Ronald L. Steffens would remand this matter to a new panel.

Board Member Diether H. Haenicke dissents and states as follows:

I am disturbed by panel's failure to conclude that respondent violated 1.7(b), and by the Administrator's failure to appeal on this ground. Respondent's representation of the township "may [have been] materially limited" by his personal interest in sexual gratification via a "relationship" with Ms. Worden. Even if respondent could have reasonably believed that his representation of his client would not be adversely affected, and even if it was not in fact adversely affected, respondent was bound to obtain client consent to continue the representation, which he did not seek for obvious reasons.