STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner-Appellee/Cross-Appellant,

v

Andrea J. Ferrara, P-29346,

Respondent/Appellant,

Case No. 98-184-GA

Issued: September 18, 2000

BOARD OPINION

The Attorney Grievance Commission, through the Grievance Administrator, has filed a petition for interlocutory review of Tri-County Hearing Panel #7's May 26, 1999 Order Following Final Prehearing Conference which dismissed Counts One through Eleven of the Formal Complaint and denied respondent's motion to dismiss the entire case as untimely. Respondent seeks interlocutory review as well. We grant review in part, modify the panel's order in part, and remand this matter to the panel for hearing.

Respondent was a judge of the Wayne Circuit Court until she was removed by the Supreme Court following Judicial Tenure Commission proceedings. This case is the second attorney discipline case commenced against respondent which stems from the conduct which was the subject of the JTC proceedings. As originally filed, the JTC's complaint against respondent essentially dealt with the allegations of Counts One through Eleven in these proceedings, which the panel has summarized as follows:

> Counts One through Eleven of the Formal Complaint charge Respondent with using racial and ethnic slurs over a period of time when she was a candidate for office and when she was in office. These alleged slurs in Counts One through Ten were tape recorded by her former husband with whom she was involved in a seemingly endless child custody and support dispute. Count Eleven alleges two racial slurs during conversations with her young son at her home. [Panel Report, p 4.]

Counts Twelve through Nineteen of the Formal Complaint deal with respondent's conduct during the JTC proceedings.

On February 9, 1998, the JTC entered its Decision And Recommendation For Order Of Discipline recommending that respondent be removed from her judicial office. This was delivered to the Court on February 10, 1998, but, in a break with past practice, was not forwarded to the AGC.

The Grievance Administrator requested a copy of the JTC's order and related documents on May 18, 1998, and received them on or about May 20, 1998. (Petitioner's brief in support of petition for interlocutory review, p 2.)

These dates are significant because MCR 9.116 provides, among other things, that: "The administrator shall file a complaint setting forth the facts of the alleged misconduct within 14 days after the Judicial Tenure Commission files its order with the Supreme Court." MCR 9.116(C). The Administrator filed a formal complaint against respondent on June 1, 1998, and the matter, Grievance Administrator v Ferrara, 98-101-GA, was assigned to Tri-County Hearing Panel #17. Respondent filed a motion to dismiss.

On July 28, 1998, before the panel had ruled on the motion to dismiss the attorney discipline case, the Michigan Supreme Court removed respondent from the Wayne Circuit bench for her "conduct after the derogatory statements were made public by the press and other media." In Re Ferrara, 458 Mich 350, 352; 582 NW2d 817 (1998), cert den 525 US 1146 (1999) .

In ruling on the motion to dismiss, the panel accepted respondent's argument that the formal complaint in that matter was "time-barred" because it was not filed within the 14-day period set forth in MCR 9.116(C). The panel dismissed the complaint without prejudice (8/31/98 Hearing Panel order). In doing so, the panel seemed to suggest that it would be possible to commence another action against respondent, not under MCR 9.116(C), which scenario was discussed at the hearing on the motion.

On September 14, 1998, the GA filed the formal complaint in this case. It was assigned to Tri-County Hearing Panel #7. Respondent filed various motions with the panel. The panel, in a commendable effort to facilitate the efficient and appropriate disposition of the 19-count formal complaint, conducted pre-hearing proceedings and requested briefing on various issues. On May 26, 1999, the panel entered its Order Following Final Prehearing Conference in which it dismissed Counts One through Eleven of the formal complaint and ruled that Counts Twelve through Nineteen would proceed to hearing.

The Grievance Administrator filed this petition for interlocutory review of the panel's order seeking (1) reversal of the panel's decision to dismiss Counts One through Eleven, and (2) a determination that the record of the JTC proceeding is admissible. Respondent filed a cross-petition for interlocutory review seeking (1) a decision that this case is barred because it was not filed within the 14-day period set forth in MCR 9.116(C), and (2) a decision that this proceeding is also barred "under principles of res judicata or estoppel" because of the previous panel's dismissal. We grant review, except as to respondent's second issue.

I.

Is the complaint in this case time-barred because it was not filed within 14 days of the JTC's recommendation as required by MCR 9.116(C)?

As noted above, the JTC's decision and recommendation was entered on February 9, 1998, and the AGC did not file its formal complaint in the first case until June 1, 1998. It is undisputed that, in this matter and without notice to the AGC, the JTC stopped its practice of forwarding a copy of its Decision and Recommendation[1] to the AGC. However, it is also admitted by the Administrator that counsel for the AGC were generally aware of the status of the JTC proceedings against respondent from media accounts. The panel in that case granted respondent's motion to dismiss based on the argument that the formal complaint in that matter was "time-barred" because it was not filed within the 14-day period set forth in MCR 9.116(C).

Subchapter 9.100 is to be liberally construed for the protection of the public, the courts, and the legal profession. MCR 9.102(A). An investigation or proceeding may not be held invalid because of a nonprejudicial irregularity or an error not resulting in a miscarriage of justice. MCR 9.107(B).

We are not persuaded that MCR 9.116(C) is intended to operate as a statute of limitations, barring the AGC from proceeding against a respondent if the time requirement is not met. Nothing in the rule suggests that dismissal is the necessary consequence for tardy filing. In Grievance Administrator v Posler, 393 Mich 38, 40-41; 222 NW2d 511 (1974), the Supreme Court interpreted what is now MCR 9.111(B):

> The hearing panel filed its report and order 77 days after the hearing. Respondent claims that the delay violates Rule 16.3.3(d) which states, "[e]ach hearing panel shall . . . [r]eport their actions to the board; within 30 days of conclusion of a hearing." This must be read in conjunction with Rule 16.33 which requires that procedures "shall be as expeditious as possible." The 30-day period in 16.3.3(d) should be regarded as a goal and not jurisdictional.

A holding that MCR 9.116(C) operates as a statute of limitations would be inconsistent with the practice in Michigan and the vast majority of other jurisdictions which adhere to the view that discipline cases are not subject to a statute of limitations. Similarly, ABA Model Rule for Lawyer Disciplinary Enforcement 32 provides: "Proceedings under these rules shall be exempt from all

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[1] MCR 9.116(C) provides: "The administrator shall file a complaint setting forth the facts of the alleged misconduct within 14 days after the Judicial Tenure Commission files its **order** with the Supreme Court" (emphasis added). The JTC files what it calls a "**Decision** and **Recommendation** for Order of Discipline" (emphasis added). See the decision and recommendation dated 2/10/98 in respondent's JTC case. The words "decision," "recommendation," and "order" are used more or less interchangeably in MCR 9.221 and 9.223.

statutes of limitations." The commentary explains the basis for this rule:

> Statutes of limitation are wholly inappropriate in lawyer disciplinary proceedings. Conduct of a lawyer, no matter when it has occurred, is always relevant to the question of fitness to practice. The time between the commission of the alleged misconduct and the filing of a complaint predicated thereon may be pertinent to whether and to what extent discipline should be imposed, but should not limit the agency's power to investigate. An unreasonable delay in the presentation of a charge of misconduct might make it impossible for an attorney to procure witnesses or the testimony available at an earlier time to meet such a charge.
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> Discipline and disability proceedings serve to protect the public from lawyers who are unfit to practice; they measure the lawyer's qualifications in light of certain conduct, rather than punish for specific transgressions. Misconduct by a lawyer whenever it occurs reflects upon the lawyer's fitness.

This principle is also reflected in MCR 9.123(B)(7), which requires a petitioner for reinstatement to establish that: "taking into account *all of the attorney's past conduct, including* the nature of the misconduct which led to the revocation or suspension, he or she [is nevertheless fit to be a member of the bar] . . ." (emphasized language added by the Court's April, 1996 amendment). See also, Grievance Administrator v Eric H. Clark, 95-59-GA (ADB 1997) (citing authorities establishing the absence of statutes of limitations in discipline cases and holding that consequences ranging from mitigation to dismissal may be appropriate in a particular case where there has been a substantial delay and a clear showing of significant prejudice to the respondent).

For these reasons, we agree with the panel's conclusion that this case is not time-barred because it was filed outside the period set forth in MCR 9.116(C).

II.

Is the JTC record is admissible in these proceedings?

MCR 9.116(A) provides, in pertinent part, that: "This rule governs an action by the [attorney grievance] commission against a judge . . . ." Subrule (D) provides:

> To the extent it is consistent with this rule, MCR 9.115 governs hearing procedure against a respondent judge. The record of the Judicial Tenure Commission proceeding is admissible at the hearing. The administrator or the respondent may introduce additional evidence.

It could be argued from subrules (A) and (D) that MCR 9.116 only applies to a "judge" or "respondent judge" and that this respondent is no longer a "judge," having been removed by the Court. However, MCR 9.116(E)(2) & (3) make it clear that a former judge may indeed be a "judge" within the meaning of the rule, at least for some purposes.

In a decision under MCR 9.116's predecessor rule, the Supreme Court explained the intent of the provision making the JTC record admissible in discipline proceedings:

> The major concern which led to the promulgation of the rule . . . was avoiding the duplication of hearings with the same witnesses and evidence where a respondent is being investigated by both the [Judicial Tenure] Commission and the [State Bar Grievance] Board [predecessor to the AGC and ADB]. [State Bar v Del Rio, 407 Mich 336, 351-352 (1979).]

It is now impossible to comply with the fast-track provisions of MCR 9.116(C) in this case. However, this does not necessarily render the remainder of the rule inapplicable. We conclude that MCR 9.116(D) regarding admissibility of the JTC record applies in this case.

III.

Should Counts One Through Eleven Have Been Dismissed Based on the Panel's Conclusion That, "If [the AGC] Chooses to [Seek] Discipline [Of] a Former Judge under MCR 9.115, it must Be Bound by the Standards for an Attorney"?

As noted above, the proceedings below were informed in part by the assumption that this case against respondent was constricted in various ways because a complaint was not filed within the time set forth in MCR 9.116(C). In its order, the panel held:

> The Commission claims these remarks are violations of MCR 9.104(2) "Conduct that exposes the legal profession or the Courts to obloquy, contempt, censure, or reproach" and MCR 9.104(4) "Conduct that violates the standards or rules of professional responsibility adopted by the Supreme Court." They also allege that this conduct is also a violation of MCR 9.205 [and] the Code of Judicial Conduct. In oral arguments, counsel for the Commission argued that these statements are violations only because a judge made them.
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> The Commission cannot have it both ways. If it chooses to discipline a former judge under MCR 9.115, it must be bound by the standards for an attorney. This Panel does not find that mere private comments, made to her ex-husband and her son are grounds for discipline for a private attorney.
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> It should be noted that the Supreme Court removed the Respondent from office because of her actions before the Tenure Commission, and did not make any ruling about the alleged racial slurs.
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> This Panel neither endorses nor condones the Respondent's comments, but it does not find that they are grounds for discipline against a private attorney and dismisses Counts One through Eleven of the Formal Complaint. [5/28/99 HP Report, p 3-4.]

In his brief, the Administrator does not contest the panel's conclusion that the racial slurs alleged to have been uttered by respondent would not be misconduct if uttered by a private attorney. Rather, the Administrator's argument is that the respondent's violations of the Code of Judicial

Conduct and standards in MCR 9.205, if proven, are relevant to the determination whether respondent has violated MCR 9.104 and the Rules of Professional Conduct. We agree.

The Administrator correctly argues that this Board has previously, in Grievance Administrator v Richard M. Maher, No 92-225-GA (ADB 1996), "accepted Petitioner's postulate that misconduct in the capacity of a judge is a basis for disciplinary action against an attorney." (Petitioner's Brief in Support of Interlocutory Review, p 10.) Abuse of judicial authority, for example, may give rise to a determination that there has been attorney misconduct.[2]

Moreover, certain counts allege violation of MRPC 8.2(b),[3] which imposes upon a lawyer-candidate for judicial office the duty to "comply with the *applicable* provisions of the Code of Judicial Conduct" (emphasis added).

Accordingly, we conclude that the dismissal of Counts One through Eleven was entered upon an erroneous basis, and we remand this matter for hearing. The issue of whether the allegations in Counts One through Eleven, if proven, violate MCR 9.205 or the Michigan Code of Judicial Conduct, or, if so, whether they also violate MCR 9.104 and the Michigan Rules of Professional Conduct, was not addressed by the panel or briefed in this review. We express no opinion on these questions, or on the merits of the other issues in this case, and we do not restrict the panel's deliberations on remand as to any questions left open by the Court's decision in In Re Ferrara, supra.

Board Members Kenneth L. Lewis, Wallace D. Riley, Michael R. Kramer, Nancy A. Wonch, C.H. Dudley, Grant Gruel, Diether H. Haenicke, Ronald L. Steffens, and Theodore J. St. Antoine concurred in this decision.

Concurring Opinion of Board Members Dudley, Haenicke, Steffens and Riley:

We concur in the decision to reverse the dismissal of Counts 1-11, but write separately to elaborate upon the point that this does not signal a position by this Board on the merits of those charges. The references to people of various ethnic backgrounds made in the tape recorded telephone conversations, and in the other private conversations, are disturbing. Though the Court did not base respondent's removal from the bench on these remarks, their relevance to a judge's qualifications is clear. We understand that under our rules judicial discipline may be followed by attorney discipline. However, we have grave reservations about the prospect of disciplining an

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[2] See, e.g., GA v Leon Jenkins, 90-139-GA (1994) ("Leon Jenkins systematically and repeatedly engaged in conduct that is reprehensible demonstrating an appalling disregard of both the Judicial Canons of Ethics and applicable attorney disciplinary rules," citing MCR 9.104(1)-(5) and the somewhat similar provisions of DR 1-102(A)(1)-(6).)

[3] MRPC 8.2(b) provides: "A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct."

attorney for private speech and thought processes under the circumstances alleged here. If, for example, a vengeful former spouse lures an attorney into dropping her guard in surreptitiously recorded private conversations which are then used in an attorney discipline context, we worry what other intrusions into an individual's sphere of privacy might be next. We can and do condemn the statements recited in Counts 1-11. The speech is grossly offensive. But, at the end of the day, we are talking about disciplining an attorney for privately expressed speech. Now that litigants and public perception regarding the fairness of respondent's former court are no longer at risk, we question the wisdom of pursuing attorney discipline for private statements. More appropriately perhaps, we question whether a legal basis for such discipline exists in light of the fact that "a lawyer's private conduct is largely beyond the scope of [the Michigan Rules of Professional Conduct]." Comment, MRPC 6.5.[1] Again, despite the foregoing expression of our reservations, we emphasize that neither we nor the Board as a whole have decided the question. Our purpose in writing is to encourage a careful examination of the issue on remand.

C.H. Dudley, Diether H. Haenicke, Ronald L. Steffens, and Wallace D. Riley

Concurring Statement of Board Member St. Antoine:

Without in any way prejudging the question, I agree with my concurring colleagues that Counts 1-11 of the Formal Complaint present difficult and sensitive issues which should be given the closest attention on remand.

Theodore J. St. Antoine

[1] We recognize that the Administrator has not charged respondent under MRPC 6.5, but we must read the Rules, including MCR 9.104, as a whole.