STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator

Petitioner/Appellant

v

Diane E. Xagoraris, P 32106

Respondent/Appellee

Case No. 99-105-GA

Decided: July 12, 2000

BOARD OPINION

The Grievance Administrator petitioned for review of a hearing panel order of dismissal entered in this matter on January 19, 2000. The Board has conducted review proceedings in accordance with MCR 9.118 and has reviewed the whole record. For the reasons stated below, the hearing panel's order of dismissal is affirmed.

The formal complaint filed on July 22, 1999 is based upon respondent's conduct in April and May 1992, in connection with her filing of a petition in Macomb County Probate Court for the purpose of transferring title to certain real property held in the names of her two minor children to herself. The following facts do not appear to be in dispute: In 1989, respondent quitclaimed her interest in the real property to her then husband, Marcos Xagoraris and he then quitclaimed his interest in the property to the couple's two minor children. Marcos Xagoraris testified to the hearing panel that this arrangement was part of a "separation agreement." In late 1989, Mr. Xagoraris fled the United States for Greece and did not return until late 1992.

On April 3, 1992, respondent filed a petition in Macomb County Probate Court, to transfer the property from her children to herself for the purpose of refinancing a mortgage on the property. It is unrebutted that a transfer of title to her name was required in order to obtain refinancing and that title could not subsequently be transferred back to the children because such a transfer would trigger a due on sale clause. In any event, there is no charge in the complaint that the minor children or Marcos Xagoraris were harmed or defrauded. Finally, it is not disputed that respondent and her husband were not divorced until 1995.

The formal complaint charges that in her petition to the Probate court filed April 3, 1992, respondent referred to the agreement described by Marcos Xagoraris as a "settlement agreement" as a "divorce agreement." The complaint further charges that at the hearing on her petition on May 27, 1992, respondent stated to the referee that she had entered into a "divorce settlement" with Marcos Xagoraris. Finally, the complaint charges that when the guardian ad litem representing the minor children inaccurately referred to Marcos Xagoraris at the hearing as respondent's "ex-husband," respondent did not correct the misstatement. The complaint alleges that because respondent and Marcos Xagoraris were not legally divorced at the time, respondent's reference in her petition to a "divorce agreement," her reference at the hearing to a "divorce settlement" and her failure to correct a reference to her "ex-husband" each constituted professional misconduct under MCR 9.104(1)-(4), MRPC 3.3(a)(1) and (4), 3.3(b), and 8.4(a)-(c).

Respondent's petition filed with the Macomb County Probate Court on April 3, 1992 and a transcript of the proceeding before the referee on May 27, 1992 were both received into evidence at the hearing conducted by a panel. There is no dispute that respondent made the statements attributed to her or that the referee referred, in one instance, to Marcos Xagoraris as respondent's "ex-husband." In addition to receiving those exhibits, the hearing panel heard the testimony of respondent, Diane Xagoraris and Marcos Xagoraris.

The question before the Board is whether the hearing panel erred in its determination that the Grievance Administrator did not establish, by a preponderance of the evidence, that respondent's conduct was in violation of the rules cited in the formal complaint.

Standard of Review

In the brief in support of petition for review, the Grievance Administrator asserts, "The panel abused its discretion in finding that respondent did not intentionally mislead the tribunal." (Petitioner's brief pg 4.) In its June 8, 1999 opinion in Grievance Administrator v Arthur C. Kirkland, ADB 98-236-GA (ADB 1999), the Board warned against the careless use (including by the Board itself) of the phrase "abuse of discretion" in referring to the standard of review to be employed by the Board. The Board quoted the following passage from Matter of Daggs, 411 Mich 304, 319-320; 307 NW2d 66 (1981):

> "Finally, the Administrator challenges the standard of review employed by the Board. The Administrator contends that abuse of discretion should be the appropriate standard and that the consequences of the existing standard is exemplified by the instant case where the Board substituted its judgment for that of the panel.
>
> While not inconsistent with the powers granted in GCR 1963, 967.4 [now MCR 9.118 (D)], an abuse of discretion standard would operate to prevent the Board from effectively carrying out its overview function of continuity and consistency in discipline imposed . . . . Hearing panels meet infrequently and are exposed to a relatively small number of discipline situations. The Board suffers from no such disadvantage." [Grievance Administrator v Kirkland, supra at p 3, quoting Daggs, supra.]

As noted elsewhere in the Administrator's brief, the Attorney Discipline Board must determine whether a hearing panel's findings have proper evidentiary support in the whole record. Grievance Administrator v Irving August, 438 Mich 296;475 NW2d#256(1991). Appling that standard of review in this case, it is abundantly clear that there is ample evidentiary support for the hearing panel's conclusion that the Grievance Administrator did not carry his burden of proof by a

preponderance of the evidence.

Discussion

As noted above, respondent does not dispute that she used the term "divorce agreement" in her petition filed with the probate court. Nor does she dispute that she used the phrase "divorce settlement" at the hearing, or that she failed to correct the guardian ad litem's reference to her "ex-husband." However, the panel found that while those phrases could be described as sloppy or careless, there was insufficient evidence in the record to establish that respondent intended to mislead. The Administrator invited the panel and the board to speculate as to respondent's motives for engaging in an intentional deception as to her marital status:

> By misleading the court about her marital status, respondent removed an issue from the Court's consideration Rather than subject herself to questioning about her husband's interest in the property, respondent chose to conceal the fact that she remained married to Mr. Xagoraris. In doing so, respondent increased the likelihood that she would promptly obtain the relief she sought. [Grievance Administrator's brief, p 8.]

No testimony was offered by the Probate Court Referee, the Guardian Ad Litem for the minor children or any other witness to establish that respondent's marital status was an issue which would have, or should have, been considered by the court in connection with her petition. Without any evidence in the record to establish that respondent's marital status was relevant or material, there is no basis upon which to speculate as to respondent's supposed motive for concealing her marital status.

On the other hand, there is evidence in the record upon which the hearing panel could have found, and did find, that respondent did not intend to deceive. Respondent testified to that effect. Marcos Xagaroris testified that the parties did, in fact, enter into an agreement under which the children were to receive his portion of the real property, that this agreement was entered into at a time when he was planing for Greece, possibly permanently, and that had a divorce occurred while

he was away, he would have had no objection. There were no other witnesses and there was no testimony from anyone that they were deceived by Ms, Xagoraris or that they would have acted differently had her marital status been expressed more clearly.

Whether respondent's statements are characterized as misstatements, or as "careless" or "sloppy," the issue before the Board is whether or not the panel erred in its factual findings that respondent did not engage in conduct involving dishonesty, fraud, deceit or misrepresentation, did not knowingly offer false evidence, or violate the other rules set forth in the formal complaint. The members of the hearing panel heard and viewed respondent as she gave her testimony. The testimony of Marcos Xagoraris did not refute her position that she and her husband entered into an agreement in contemplation of divorce. Even if the Grievance Administrator, another hearing panel, or this Board might have viewed that evidence in a different light, the findings of this hearing panel have evidentiary support and will not be disturbed.

Respondent was asked directly whether it occurred to her when she referred to a "divorce agreement" that she was telling the Court, impliedly if not expressly, that she was divorced from Marcos Xagoraris. Her answer to that question was an unqualified "no" (t 47). We trust that, in the future, respondent will take greater pains to err on the side of caution when making any oral or written representations to a tribunal which could be subject to misinterpretation.

However, we do not wish to leave the impression that this case presents a close question in terms of the charges of professional misconduct before the panel. Respondent filed for divorce in 1987 but did not go through with it. Respondent and Marcos Xagoraris lived apart after February 1987. On June 7, 1989 respondent quitclaimed her interest in the property to Marcos Xagoraris pursuant to an agreement that was "firmed up" on that date. The couple was dividing property in contemplation of divorce. Mr. Xagoraris conveyed the property to the children of the marriage on

or about July 27, 1989. Shortly thereafter, he left for Greece either to avoid the DEA or to start a new life with his girlfriend and their child. In late 1989 or early 1990, respondent filed for divorce. The case was dismissed for lack of progress. The probate proceedings at issue took place in 1992. By late 1995 respondent had obtained a divorce. Mr. Xagoraris was released from prison December 28, 1995 and thereafter commenced litigation against respondent.

We could imagine a case with similarities to this which involved intentional deception, calculated to produce some benefit (or not), on some material point (though an intentional misrepresentation may be misconduct even on an "immaterial " point), or which does in fact mislead or produce some harm (or benefit), or some other factors which would take this case into the realm of deceit or even misrepresentation. But none of this has been shown here. Indeed, the panel found, in essence, that *respondent's* statements were substantially correct. The panel also found, based on the record, that respondent's status *vis a vis* Mr. Xagoraris "had no bearing whatever on the outcome of the [respondent's] request in the Probate Court." This may have partially formed the basis for the panel's conclusion that respondent's failure to correct the Guardian's "misstatement" did not amount to misconduct. We can discern no basis to overturn the panel's decision.

With respect to the "separation agreement" representation, it is difficult to even understand how petitioner could claim that this was false. "Divorce agreement" is not significantly different in this context. It is not a term of art, such as "divorce judgment." In fact, anyone hearing the term would be bound to inquire as to its meaning – if it made a difference. The G.A.L.'s use of the phrase "ex-husband" may not have been literally in accord with the legal status of the parties, but we are not prepared to hold in this case that respondent's failure to notice and correct this statement constitutes misconduct.

It would trivialize the rules requiring candor and truthfulness were we to hold that

"misrepresentation" within the meaning of the Rules of Professional Conduct could be established by showing mere inaccuracy without more.

Accordingly, we affirm panel's order of dismissal in this case.

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

Board Members Michael R. Kramer and Grant J. Gruel did not participate.