Grievance Administrator,

Petitioner/Appellant,

v

Harvey I. Wax, P-22054,

Respondent/Appellee,

98-112-GA.

Decided: September 22, 1999

BOARD OPINION

The Grievance Administrator filed a formal complaint alleging, in Count One, that respondent violated MRPC 3.3(a)(1) and MRPC 8.4(b) by making a false statement in an appellate brief. Count Two charges respondent with violating various rules by making a false statement in his answer to the request for investigation. After the Administrator rested, Tri-County Hearing Panel #1 dismissed both counts pursuant to MCR 2.504(B)(2). The panel also took respondent's motion for sanctions under advisement. The Administrator has filed a petition for review asking this Board to reverse only the dismissal of Count Two of the formal complaint. The Administrator also seeks an order directing the panel to deny respondent's motion for sanctions. We affirm the hearing panel's order of dismissal, and we narrowly conclude that sanctions are not appropriate in this case.

The first question before us involves respondent's denial, in answer to the request for investigation, that he made a certain statement in the appellate brief at issue in Count One (but not at issue in this review). Count Two alleges that:

> Respondent violated his duties and responsibilities by denying that he misled the Court of Appeals and directing the Attorney Grievance Commission to page 6 of Appellant's Brief when Respondent knew or should have known that the relevant portion of Appellant's Brief was at page 18.

As is set forth more completely in the panel's report (appended to this opinion), respondent admitted at the hearing that page 18 of the brief does contain the statement he denied making. The panel's report states in pertinent part:

> With respect to count II, respondent testified after having been called for cross-examination by petitioner's counsel, MCR 9.115(H), that, although his response to the request for investigation contained a misstatement, he did not intend to mislead or knowingly misrepresent a material fact to the grievance administrator. Rather, he stated that his focus was directed to a different portion of his brief by the nature of the request for investigation and the allegations against him. He acknowledged neglect and haste in examining his pleadings before filing his answer to the request for investigation, but stated that he in no way intended to mislead or prevaricate.

> We find that the respondent's testimony is credible and has not been contradicted by any evidence offered by the petitioner. If respondent intended to lie about the contents of his appellate brief, it is unlikely that he would have attached a copy to his answer. To the extent that the brief itself was incorporated into Mr. Wax's written response, the answer to the request for investigation is internally inconsistent, not patently false. The petitioner has not proven by a preponderance of the evidence that respondent knowingly made a false statement of material fact in connection with a disciplinary matter, and has not established a violation of MRPC 8.1(a), 8.4(a-c) or MCR 9.103(C), or MCR 9.104(1-4) or (6). Count II likewise must be dismissed.

On review, the Administrator argues that the hearing panel's decision to dismiss Count Two is not supported by the evidence. We disagree. This Board reviews the factual findings of a hearing panel for proper evidentiary support. Grievance Administrator v Donald H. Stolberg, Nos 95-72-GA; 95-107-FA (ADB 1996) (affirming panel dismissal), citing Grievance Administrator v James H. Ebel, 94-5-GA (ADB 1995). In applying this standard of review, it is not our function to substitute our own judgment for that of the panel or to offer a *de novo* analysis of the evidence. Grievance Administrator v Carrie L. P. Gray, 93-250-GA (ADB 1996). And, because the hearing panel has the opportunity to observe witnesses during their testimony, we defer to the panel's assessment of their demeanor and credibility. Grievance Administrator v Neil C. Szabo, 96-228-GA (ADB 1998); Grievance Administrator v Deborah C. Lynch, No 96-96-GA (ADB 1997). See also In re McWhorter, 449 Mich 130, 136 n 7 (1995).

The Administrator argues that:

> The hearing panel apparently focused its analysis on whether Respondent had "knowingly" made false statements of material fact in his Answer [to the request for investigation]. However, Respondent's state of mind is irrelevant to a finding of misconduct pursuant to MCR 9.103(C) and MCR 9.113(A).
>
> The only relevant issue is whether Respondent made the offending statement in the Appellant's Brief.

In other words, the Administrator is arguing for strict liability in the event of a misstatement in response to a request for investigation. The rules wisely do not provide for this.

The first rule relied upon, MCR 9.103(C), is not applicable here. Thus, although the panel did not state this basis for its ruling, the panel correctly concluded that this rule was not violated. MCR 9.103(C) plainly refers to the duty of an attorney who is not a respondent to assist the Administrator in an investigation. A respondent's duty is governed by MCR 9.113(A), and it is to file an answer to the Administrator's request "fully and fairly disclosing all the facts and circumstances pertaining to the alleged misconduct." That rule further provides: "Misrepresentation in the answer is grounds for discipline."

Of course MCR 9.113(A), and, assuming for the sake of argument that it is applicable, MCR

9.103(C), must be read in light of MCR 9.104(6) and MRPC 8.1(a) which provide that knowing misrepresentation in connection with a disciplinary investigation is misconduct. We need not now decide the precise mental state necessary to support a finding of misconduct under MCR 9.113(A). It was not recited in the charging paragraph in the formal complaint, and was therefore not addressed by the panel. Moreover, we reject the notion that respondent's state of mind is irrelevant and we find no basis to disturb the panel's determination in this case that respondent's unintentional misstatement in answer to the request for investigation does not amount to misconduct.

The Administrator also asks that we order the panel to dismiss the respondent's motion for sanctions which has been taken under advisement. The Administrator argues that the hearing panel has no authority to entertain a motion for sanctions against the Attorney Grievance Commission or its counsel in light of MCR 9.125 (immunity) and 9.128 (costs). Respondent argues, more persuasively, that MCR 2.114's provisions on sanctions are made applicable to discipline proceedings through MCR 9.115(A). We need not decide this question now because we find that, in any event, a violation of MCR 2.114(D) has not been established. Unfortunately, however, the question is a close one. But, although the case against respondent lacks merit, we are not prepared to say that the petitioner's filings in this matter rise to the level of sanctionable conduct. Accordingly, in the interest of adjudicative economy, we decline to remand this matter or to permit further proceedings by the panel on respondent's motion for sanctions. The panel's order of dismissal is affirmed.

Board Members Elizabeth N. Baker, C. H. Dudley, Barbara B. Gattorn, Roger E. Winkelman, and Nancy A. Wonch concurred in this decision.

Board Members Grant J. Gruel, Albert L. Holtz, Michael Kramer, and Kenneth L. Lewis were absent and did not participate.

STATE OF MICHIGAN
ATTORNEY DISCIPLINE BOARD

GRIEVANCE ADMINISTRATOR,

Petitioner,

v

HARVEY I. WAX, P-22054,

Respondent.
_____/

Case No. 98-112-GA

REPORT OF TRI-COUNTY HEARING PANEL #1

At a session of the panel held at 719 Griswold, Suite 1910, Detroit, Michigan on Monday, August 10, 1998.

PRESENT: Miles A. Hurwitz, Chairperson
David A. Lawson, Member
Christine A. Simpson, Member

APPEARANCES: Frances A. Rosinski, for the Petitioner
Bruce T. Leitman, for the Respondent

I. PLEADINGS

DATE	DESCRIPTION
6/16/98	Formal Complaint, Discovery Demand
6/18/98	Notice of Hearing
6/23/98	Proof of Service
6/25/98	Notice of Substitution of Panelist
6/30/98	Appearance, Proof of Service
7/13/98	Answer to Formal Complaint, Answer to Discovery Demand, Discovery Demand, Proof of Service
7/17/98	Petitioner's Response to Respondent's Discovery Demand, Proof of Service
7/24/98	Petitioner's Motion for Summary Disposition, Brief in Support, Proof of Service
7/30/98	Respondent's Answer to Petitioner's Motion for Summary Disposition, Memorandum in Support, Proof of Service
8/19/98	Itemized Statement of Expenses, Proof of Service
8/21/98	Respondent's Motion for Sanctions, Memorandum in Support, Proof of Service
9/1/98	Respondent's Objection to Petitioner's Itemized Statement of Expenses, Proof of Service

> Superintendent Rhoades, himself, admitted at deposition that he perceived that Appellant's mental condition made him a risk to students, and thus constituted a disqualifying handicap. Rhoades, 50-51, 62, 84, 87-88, 94.

(Appellant's brief, p. 18.)

The Court of Appeals affirmed the lower court's summary disposition. In its unpublished, *per curiam* opinion the court, presumably referring to the above-quoted statement from Mr. Wax's brief, states:

> Notwithstanding his admission to criminal conduct involving school-aged girls, plaintiff contends that the true motivation behind defendant's actions is a discriminatory animus against an individual who *[sic]* defendant perceives to be suffering from bipolar disorder or who has had a history of bipolar disorder. In support of this argument, plaintiff argues that defendant's then superintendent, Jon Rhoades, admitted in his deposition that he was concerned that plaintiff's bipolar disorder would pose a risk to students. *Plaintiff's argument is not only unsupported by the record, but also his characterization of Rhoades' testimony is a deliberate attempt to mislead this Court.*

Wahl v. Jefferson Schools, unpublished opinion per curiam of the Court of Appeals, decided May 2, 1997 (Docket No. 187977), p. 3. (Emphasis added.)

The Attorney Grievance Commission subsequently sent a request for investigation to Mr. Wax, which is not part of the record before us. Mr. Wax's response, which was admitted by stipulation as Petitioner's Exhibit B, contains the following statement:

> The grievance is predicated on a gratuitous, but totally unfounded statement, which appears in an unpublished *per curiam* opinion of the Court of Appeals affirming the summary dismissal of Mr. Wahl's discrimination case under Michigan's Handicappers Civil Rights Act. Had the Court panel taken time to actually read the argument in my brief and to review the deposition references which accompanied the brief, it could not have possibly have chided me for "a deliberate attempt to mislead" it. Once you have read the relevant statements in Appellant's Brief, and the accompanying deposition excerpts, it will become clear that my argument was well within the bounds of appropriate advocacy, and not intended to mislead the Court.
>
> The grievance asserts that my claim that Superintendent Jon Rhoades "admitted in his deposition he was concerned that Plaintiff's bipolar disorder would pose a risk to students," "is not only unsupported by the record, but also...is a deliberate attempt to mislead this Court." *I have never claimed that Rhoades made such an admission.* The Court misquoted or misread my argument.

(Respondent's Answer to Request for Investigation, p. 2.) (Emphasis added.) Mr. Wax attached a copy of his appellate brief to the Answer to the Request for investigation.

The formal complaint alleges in count I that Mr. Wax violated MRPC 3.3(a)(1) and 8.4(a-c), which prohibits professional misconduct and "knowingly * * * mak[ing] a false statement of material fact or law to a tribunal * * *."

Count II alleges that respondent's statement on page two of his answer to the request for investigation that he "never represented to the Court that Rhoades 'admitted' he was concerned that my client's disorder would pose a risk to students," was a false statement and that respondent thereby violated MCR 9.103(C), 9.104(1)-(4) and (6), and MRPC 8.1(a) and 8.4(a-c).

Respondent answered the formal complaint on July 13, 1998. In his answer, respondent admits writing the quoted statements set forth in count I, but denied that the statement violated his duties and responsibilities or the rules set forth in count I.

Regarding count II, respondent admits that the quoted statement appears in his answer to the request for investigation and that he directed the Attorney Grievance Commission's attention to page six of his Appellate Brief, but he denies "[t]hat the portion of the brief to which he directed the AGC was 'the' pertinent portion of the brief, as opposed to 'a' pertinent portion of the brief." Answer to Formal Complaint, p. 4. He denies that he violated his duties and responsibilities or the rules set forth in count II, stating:

> [W]hile respondent admits that, at one point in his answer, he directed the Attorney Grievance Commission's attorney to page six of the appellant's brief * * * respondent affirmatively avers that his failure to make reference to page 18 of his brief was unintentional.
>
> Respondent affirmatively avers * * * that at no time, while drafting his answer to the request for investigation, did respondent attempt to mislead the Attorney Grievance Commission, nor to state anything that was legally or factually incorrect.

Answer to Formal Complaint, pp.4-5.

Petitioner filed a motion for summary disposition under MCR 2.116(C)(9) and (10) alleging that respondent failed to plead an adequate defense and that there was no material fact issue that needed to be resolved by a testimonial hearing. Attached to the motion was, among other things, Mr. Wax's appellate brief in the *Wahl* appeal and pages 13, 22, 41, 50, 51, 62, 68, 84, 87 and 89 of the Rhoades' deposition.

The thrust of petitioner's argument was that respondent's categorical denial of the allegations in the formal complaint were insufficient where respondent also admitted signing and filing the appellate brief which contained the "false" statement (entitling petitioner to summary disposition under MCR 2.116(C)(9)), and that the deposition pages did not support the statement contained in the brief (entitling petitioner to summary disposition under MCR 2.116(C)(10)). The brief did not address the respondent's defense that his statement forming the basis of count II of the formal complaint was not "willful."

The motion for summary disposition was denied by this panel at the commencement of the evidentiary hearing. We found that there were sufficient fact issues presented by the pleadings which required an evidentiary hearing.

A public hearing was conducted on Monday, August 10, 1998, in Detroit, Michigan. Petitioner's Exhibits A through D were admitted by stipulation. Following opening statements, petitioner's counsel called the respondent, Harvey I. Wax, to testify pursuant to MCR 9.115(H).

IV. FINDINGS AND CONCLUSIONS

The essence of the formal complaint is that Mr. Wax deliberately misled the Court of Appeals when he said that Superintendent Rhoades admitted he perceived Mr. Wahl's mental condition to be a risk to students.[1] In fact, at page 94 of Superintendent Rhoades' deposition[2], he testified:

> Q Well what was the -- what were the questions you wanted the doctor to answer for the district?
>
> A My number one concern is the safety and well-being of the students which might be assigned to Mr. Wahl, and I wanted somebody to beyond a shadow of the doubt to convince me beyond a shadow of the doubt that was going to be the situation. I have not received that to this day.

This testimony must be read in context with Rhoades' earlier testimony contained on pages 87 and 88 of the deposition:

> Q So is it fair to say that you were saying here that you weren't sure yet whether or not tenure charges should be filed, and your decision would depend upon what the doctor said?
>
> A There is a fair amount of practicality in that statement, yes.
>
> Q And I guess as a follow up to that question, would it be fair to say that there was some circumstance under which a medical diagnosis may have convinced you not to file tenure charges?

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[1]To the extent that petitioner claims that Mr. Wax contended in his Court of Appeals Brief that Superintendent Rhoades admitted that Wahl had a disqualifying handicap, that argument must be dismissed out of hand. The clause contained in Mr. Wax's brief, set off by a comma ("and this constituted a disqualifying handicap"), is a reference to the legal conclusion which Mr. Wax advanced on behalf of his client. The legal conclusion was derived from the factual admission which Mr. Wax contended was contained in the referenced deposition pages. Nor does it appear that the Court of Appeals itself perceived Mr. Wax to be arguing that Superintendent Rhoades admitted that Wahl had a "disqualifying handicap" as such.

[2]Page 94 of the Rhoades deposition was not attached as an exhibit to petitioner's motion for summary disposition or the supporting brief.

A I don't know at this point because I never saw them.

The statement on page 94 of Rhoades' deposition directly supports the argument contained in Mr. Wax's brief. Rhoades' testimony itself is an acknowledgment that he perceived some condition of Mr. Wahl's to cause a "concern [for] the safety and well-being of the students * * *." The answer on page 94 of the deposition is in response to a question asking why the district wanted a doctor to examine Wahl.

It is clear from the context that Rhoades' "concern" is based on his perception of Wahl's medical/psychological condition.

The reason for the Court of Appeals' criticism of Mr. Wax is not apparent from the record. Perhaps the Court of Appeals, like the trial court, misapprehended the argument. Perhaps the court was not sufficiently familiar with the record. Perhaps the court, for some reason, was unable to put the argument in its proper context. It is pellucidly clear, however, that the statement which Mr. Wax made in his brief does not mischaracterize the record, and the characterization of Rhoades' testimony was not an attempt by Mr. Wax to mislead the Court. Mr. Wax was wrongly accused.[3]

The injustice to Mr. Wax was compounded by filing the formal complaint in this case. We believe that allegations that lawyers have violated MRPC 3.3(a)(1) must be cautiously examined because the rule governs the principles of advocacy which are at the core of the adversary process. While deliberate false statements and knowing misrepresentations of facts to courts and tribunals must be roundly condemned, care needs to be taken to accurately distinguish the violators from honest advocates who vigorously advance their clients' cases.

Attorney discipline proceedings are not the same as contempt proceedings. However, the danger that misdirected disciplinary prosecutions may chill honest advocacy is just as great, and we take guidance from the contempt cases which urge caution in such circumstances. For instance, in *People* v *Kurz*, 35 Mich App 643, 651; 192 NW2d 594 (1971), the Court noted:

> It has also been observed that, "A lawyer cannot be timorous in his representation. Courage and zeal in the defense of his client's interest are qualities without which one cannot fully perform as an advocate."
>
> Unless a lawyer's conduct manifestly transgresses that which is permissible it may not be the subject of charges of contempt. Any other rule would have a chilling effect on the constitutional right to effective representation and advocacy. In any case of doubt, the doubt should be resolved in the client's favor so that there will be adequate breathing room for courageous, vigorous, zealous advocacy.

(Footnotes omitted.)

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[3]Ancient authority suggests the gross impropriety of accusing a person of something he did not do. "To impose a fine on the innocent is not right, or to flog the noble for their integrity." *Proverbs* 17:26.

The United States Supreme Court has recognized that lawyers must have latitude to present claims which stray from the main stream or which push the envelope of traditional interpretations. In *Sacher* v *United States*, 343 US 9; 72 S Ct 451; 96 L Ed 717 (1952), Justice Jackson stated:

> Of course, it is the right of every counsel for every litigant to press his claim, even if it appears far fetched and untenable, to obtain the Court's considered ruling. Full employment of that right, with due allowance for the heat of controversy, will be protected by appellate courts when infringed by the trial courts.

This language was cited with approval and adopted in *In re Henry*, 369 Mich. 347, 362; 119 NW2d 671 (1963).

We are mindful that these cases deal with criminal contempt prosecutions in which the contemnor must be proved guilty beyond a reasonable doubt. Petitioner's burden in this case is to establish the allegations in the petition by a preponderance of the evidence. MCR 9.115(J)(3). The petitioner has not met its burden. To the contrary, the evidence presented at the hearing establishes beyond doubt that (a) the statement respondent made to the Court of Appeals is not false; and (b) the respondent did not knowingly make a false statement of material fact or law to the Court of Appeals. Count I, therefore, must be dismissed.

With respect to count II, respondent testified after having been called for cross-examination by petitioner's counsel, MCR 9.115(H), that, although his response to the request for investigation contained a misstatement, he did not intend to mislead or knowingly misrepresent a material fact to the grievance administrator. Rather, he stated that his focus was directed to a different portion of his brief by the nature of the request for investigation and the allegations against him. He acknowledged neglect and haste in examining his pleadings before filing his answer to the request for investigation, but stated that he in no way intended to mislead or prevaricate.

We find that the respondent's testimony is credible and has not been contradicted by any evidence offered by the petitioner. If respondent intended to lie about the contents of his appellate brief, it is unlikely that he would have attached a copy to his answer. To the extent that the brief itself was incorporated into Mr. Wax's written response, the answer to the request for investigation is internally inconsistent, not patently false. The petitioner has not proven by a preponderance of the evidence that respondent knowingly made a false statement of material fact in connection with a disciplinary matter, and has not established a violation of MRPC 8.1(a), 8.4(a-c) or MCR 9.103(C), or MCR 9.104(1-4) or (6). Count II likewise must be dismissed.

After the petitioner rested at the evidentiary hearing, respondent moved for judgment pursuant to MCR 2.504(B)(2), which permits the panel to determine the facts and render judgment against the petitioner at this stage in the proceedings. We grant the motion because we find that neither the statement at issue in count I, nor the statement at issue in count II, has been proven to be knowingly false. The panel further finds that even if one or both of those statements were proven to be facially false, the petitioner has not presented any evidence that the respondent knew or would have known that they were false at the time they were made. The

panel further finds that the respondent's testimony was entirely credible, and his explanations of the statements at issue are sufficient to defeat the allegations of misconduct.

Based on the foregoing, respondents motion for involuntary dismissal is granted, as set forth in the attached order.

V. SUMMARY OF PREVIOUS MISCONDUCT

None.

VI. STATEMENT OF ITEMIZED COSTS

(Not Assessed.)[4]

Attorney Grievance Commission:	$ 6.46
Attorney Discipline Board:	$335.25
TOTAL:	$341.71

ATTORNEY DISCIPLINE BOARD
Tri-County Hearing Panel #1

By _____
Miles A. Hurwitz, Chairperson

By _____
David M. Lawson, Member

By _____
Christine A. Simpson, Member

[4]The costs of this proceeding, while set forth above, are not being assessed against respondent. Respondent's Objection to Petitioner's Itemized Statement of Expenses is therefore moot.