STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellant,

v

Eugene P. Williams, P-22344,

Respondent/Appellee.

Case No. 98-203-GA.

BOARD OPINION

A formal complaint was filed against respondent Eugene P. Williams on October 1, 1998 alleging that respondent solicited and received oral sex from a female client while he was visiting her as her attorney in the attorney-client visiting room of the Macomb County jail on or about April 26, 1998. The hearing panel found that the charges were established by the evidence and that respondent's conduct violated MCR 9.104 (1)-(4) and Michigan Rules of Professional Conduct 1.7(b), 6.5(a) and 8.4 (a) and (c). The panel ordered a suspension of respondent's license to practice law for 180 days and until he has petitioned for reinstatement and established his eligibility for reinstatement in accordance with MCR 9.123(B) and MCR 9.124. Respondent has petitioned for review on the grounds that the Grievance Administrator did not meet his burden of proof by showing that the alleged act of sexual conduct occurred; that if the alleged act did occur, the sexual contact between this lawyer and his client did not constitute a basis for professional discipline; and that if discipline is to be imposed, a suspension of 180 days is excessive. For the reasons discussed below, we affirm the hearing panel's decision.

I. Panel's Findings and Conclusions as to Misconduct

A. The Hearing Panel's factual findings have evidentiary support.

On review, the Attorney Discipline Board must determine whether a hearing panel's factual findings have proper evidentiary support in the whole record. Grievance Administrator v August, 438 Mich 296; 475 NW2d 256 (1991). When those findings involve issues of credibility, the Board has traditionally deferred to the hearing panel, which had a first hand opportunity to observe and assess the demeanor of the witnesses. Grievance Administrator v Neil C. Szabo, 96-228-GA (ADB 1998.)

A review of the record in this case discloses ample evidentiary support for the hearing panel's factual findings. Respondent's client was called as a witness and testified that respondent came to the Macomb County jail on April 26, 1998, in a room reserved for attorney-client conferences. They discussed the pending charges (driving under the influence of drugs, causing death) and, specifically, respondent's request for additional attorney fees and advance costs to retain an expert. The client testified to the panel:

> A. I was kind of surprised to see him, because he usually didn't come after court, and I had court that Thursday prior to the Sunday. And he had said to me that he needed some more money from my father or my brother. And I told him that he would have to discuss that with them. I was in no position financially to do anything. And I asked him about what my chances were about getting out of jail my next time in court, and he was vague. And he asked me to do him a favor.
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> Q. What did he do then?
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> A. He unzipped his pants. [Tr, p 66.]

The client testified that she administered oral sex to respondent while kneeling between his legs. When asked why she performed this act, she stated:

> A. Well, I wanted out of jail, and this was my attorney. I thought he was, you know, that I didn't have any money for him. He has just gotten some money from my family. So I figured if I do this, maybe, he will do a better job of getting me out. [Tr, p 68.]

Later, she continued:

> He held my freedom in the palm of his hand. He was my attorney. I didn't know what was going to happen. I didn't know if I have the money to retain other attorneys. My father just shelled out like seven thousand dollars to this man. I didn't know if I was going to have to go back to a court appointed attorney or if I was going to get proper representation. [Tr, p 69.]

The client acknowledged that she was not physically forced to give respondent oral sex nor did he verbally specify the nature of the "favor" he wished her to provide when he unzipped his pants. However, the client testified that she had no desire to enter into a romantic relationship with respondent and she reiterated her belief that, given her financial situation, it was in her best interest to provide the "favor" which was obviously requested of her when he exposed himself to her. (Tr, pp 92-93.)

Further testimony as to the alleged incident was offered by Macomb County Sheriff's Department Sergeant Thomas Murphy who looked through the window of the closed door to the

attorney-client conference room. He testified that respondent was seated in a chair and that respondent's client was kneeling with her head "bobbing up and down" in the area of respondent's crotch.

After entering the room, Sergeant Murphy asked respondent to come out and informed respondent that if he wished to have any further visits, he would have to contact the jail administrator. Immediately following the incident, respondent's client was strip-searched for contraband and escorted back to her cell. She was then placed in "lockdown" until the next morning (in a "lockdown" an inmate is placed in a cell and released for only one hour per day). Sergeant Murphy testified that respondent's client was in lockdown until the next day when it was decided that she was the victim, not the perpetrator.

Respondent, who was 68 years old at the time of this incident, offered medical records to the panel pertaining to his successful coronary artery bypass in August 1997, his post-operative condition and his treatment, including prescription medication, for impotence. However, no testimony was offered by any witness on respondent's behalf regarding his conduct at the Macomb County jail on April 26, 1998.

In his arguments to the panel and the Board, respondent pointed out some inconsistencies between his client's testimony to the panel and her testimony at an early preliminary examination in Macomb County. He also asked the panel and the Board to draw inferences from what the jail employee did or did not see in the narrow confines of the interview room. Respondent's counsel asks the Board to consider whether there could be "innocent reasons" for the physical position respondent and his client were in when observed by Sergeant Murphy ("Perhaps there was a pad of paper in his lap or he dropped a pen . . ." Rev. Hrg. Tr, p10).

Under the applicable standard of review, the Board does not conduct a de novo review of the evidence. The tasks of assessing the credibility of the witnesses, weighing inconsistencies and drawing inferences fell to the hearing panel. The hearing panel in this case has discharged those duties. Where there is evidentiary support for its findings, a panel's findings will be affirmed.

B. The Panel's conclusions as to misconduct.

Respondent argues that even if the alleged act did occur at the Macomb County Jail, "sexual contact between a lawyer and his clients is not the basis for discipline." (Respondent's Brief, p 7.) In support of this argument, respondent cites the Michigan Supreme Court's recent decision not to adopt a per se rule prohibiting sexual relations between an attorney and a client[1] and a 1997 Board

[1] Supreme Court Administrative Order 94-46 (1998).

Opinion.[2] Respondent's reliance on these authorities is misplaced. We categorically reject the notion that sexual contact between a lawyer and a client cannot form the basis for professional discipline under the existing rules. This is especially true where, as in this case, there has been a specific finding that the act performed by the client was not consensual.

In February 1998, the Supreme Court published for comment a proposal to amend Rule 1.8 of the Michigan Rules of Professional Conduct to limit sexual relationships between lawyers and clients. 456 Mich 1223 (1998). In an order entered October 15, 1998, the Court announced that, after careful study, it had decided not to amend that rule. However, the Court noted that it was "mindful of the concerns of those who support the proposal" and offered some guidance in the text of the order and in the accompanying comment.

By declining to adopt a specific rule limiting sexual relations between a lawyer and a client, the Court did not declare that such a relationship could never be the basis for discipline. On the contrary, the Court based its decision on the conclusion that a basis for finding professional misconduct already exists in the rules:

> The Michigan Rules of Professional Conduct adequately prohibit representation that lacks competence or diligence, or that is shadowed by a conflict of interest. With regard to sexual behavior, we note that the Michigan Court Rules provide that a lawyer may be disciplined for "conduct that is contrary to justice, ethics, honesty or good morals." MCR 9.104(3). We also observed that the Legislature has enacted criminal penalties for certain types of sexual misconduct. [Administrative Order 94-46, 459 Mich 1206 (1998).]

As the Court further explained in the order and the amendment to the official comment to MRP 1.8,

> We emphasize that a lawyer bears a fiduciary responsibility toward the client. A lawyer who has a conflict of interest, whose actions interfere with effective representation, who takes advantage of a client's vulnerability or whose behavior is immoral risks severe sanctions under the existing Michigan Court Rules and Michigan Rules of Professional Conduct. [Official Comment, MRPC 1.8.]

Many of those existing prohibitions are applicable in this case. The sexual contact between respondent and his client in the visiting room at the Macomb County Jail was a conflict of interest (respondent's self- interest in obtaining gratification versus his duty not to jeopardize his client by exposing her to the risk of disciplinary action for violating rules of prisoner conduct); did interfere with his effective representation (the forced act in question, by its nature, was not based upon mutual trust and respect but upon sexual dominance) and did take advantage of his client's vulnerability

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[2] Grievance Administrator v Glenn R. Stevens, 95-240-GA (ADB 1997).

(the client testified that she wanted to get out of jail and that "he held my freedom in the palm of his hand" Tr, pp 68-69).

Nor does the Board's opinion in GA v Glenn R. Stevens, supra, support the proposition advanced by respondent on appeal. In that case, the respondent attorney, besides engaging in other professional misconduct resulting in discipline, engaged in a sexual relationship with a female client. The parties and the panel all characterized the relationship as consensual. The hearing panel in that case concluded that the proofs did not establish that the consensual sexual relationship itself constituted grounds for professional discipline.[3] We affirmed, but we based that affirmance on narrow grounds:

> This [affirmance] is not because of the nature of respondent's relationship with his client but because of the extremely limited scope of the rule violations charged in the complaint. Although the authorities cited by the Administrator support the contention that a sexual relationship with a client during the period of representation may violate certain rules of professional conduct, those rules were not charged in this complaint. [GA v Glenn R. Stevens, supra, pp 6-7 (emphasis in original).]

In Stevens, supra, we cited with approval Formal Opinion No. 92-364 of the American Bar Association (1992). We reiterate that approval here. In that opinion, the ABA's Committee on Professional Ethics stated:

> The Committee has been asked whether a lawyer violates the ABA Model Rules of Professional Conduct [citations omitted] . . . by entering into a sexual relationship with a client during the course of representation. In the opinion of the Committee, such a relationship may involve unfair exploitation of the lawyer's fiduciary position and presents a significant danger that the lawyer's ability to represent the client adequately may be impaired, and that as a consequence the lawyer may violate both the model rules and the model code. The roles of lover and lawyer are potentially conflicting ones as the emotional involvement that is fostered by a sexual relationship has the potential to undercut the objective detachment that is often demanded for adequate representation.

That formal opinion identified five provisions of the ABA Model Rules of Professional Conduct potentially applicable to a sexual relationship between a lawyer and client. Each model rule cited by the Committee has an identical counterpart in the Michigan Rules of Professional Conduct. Those rules are: MRPC 1.7(b) (conflict between the client's and lawyer's own interests); MRPC 1.8(b) (protection of confidential client information); MRPC 1.14(a) (recognition of a client's

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[3] The panel was reluctant to adopt a per se rule against lawyer-client involvement. We recognize that emotional attachments may develop between lawyers and their clients in an entirely innocent way, and we do not hold that professional misconduct necessarily results. Yet the potential for abuse of power, conflict of interest, or loss of professional objectivity is nearly always present. The prudent course for the lawyer in such circumstances is to withdraw from the case and arrange for another attorney to represent the client.

emotional vulnerability); MRPC 2.1 (a lawyer's duty to exercise independent professional judgment); and, MRPC 3.7 (a lawyer's duty to withdraw if the lawyer will be a witness).

In Stevens, the Grievance Administrator presented ABA Formal Opinion No. 92-364 as authority for the proposition that respondent's consensual sexual relationship constituted professional misconduct. However, the formal complaint in that case did not charge respondent Stevens with a violation of any of the rules identified in the ethics opinion or the cases cited from other jurisdictions.[4] Instead, the Administrator relied exclusively on a rule which is unique to Michigan and has no counterpart in the ABA Model Rules, MRPC 6.5(a), which directs a lawyer to "treat with courtesy and respect all persons involved in the legal process." We ruled in Stevens that the Grievance Administrator had failed to establish that the consensual relationship with a client was inherently "discourteous."

By contrast, the formal complaint filed in this case does charge that respondent's conduct violated MRPC 1.7(b) which prohibits a lawyer from representing a client if that representation may be materially limited by the lawyer's own interests. That charge was appropriate in this case as was the hearing panel's conclusion that respondent's conduct violated that rule. Moreover, the consensual relationship in Stevens is distinguishable from the non-consensual act in this case and we affirm the panel's finding that respondent's conduct violated MRPC 6.5(a).

II. Level of Discipline

Finally, respondent seeks a reduction in the 180 day suspension imposed by the hearing panel under the facts and circumstances presented. Respondent acknowledges that he has been the subject of three prior discipline actions.[5] However, respondent argues that those discipline actions were essentially for neglect caused by alcohol abuse and he points out that the conduct in question occurred prior to 1986. He argues further that his conduct was mitigated by his medical condition and by the absence of prior charges for this type of behavior.

Arguing against a reduction in the level of discipline, the Grievance Administrator cites the aggravating factors of respondent's substantial experience of over 25 years in the practice of law and the vulnerability of his victim. The Grievance Administrator has invited the Board to compare the discipline imposed in this case to discipline ranging from a 180-day suspension to revocation in three cases involving inappropriate sexual advances by an attorney.

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[4] For a further discussion of the impropriety of a sexual relationship between an attorney and a client, see Drucker's Case, 577 A2d 1198 (NH 1990).

[5] File No. DP 140/80 - Reprimand, effective 7/28/81; File Nos. DP 210/82, et al - Probation 2 Years, effective 10/7/82; and File No. DP 197/85 - Suspension 119 Days, effective 12/16/86.

Review of those cases cited by the Administrator must be undertaken in light of the underlying principle enunciated by the Supreme Court that:

> In reviewing the discipline imposed in a given case, we are mindful of the sanctions meted out in similar cases, but recognize that analogies are not of great value. [Matter of Grimes, 414 Mich 43; 326 NW2d 380 (1982)].

This principle was recently reiterated by the Court when it stated "Attorney misconduct cases are fact sensitive inquiries that turn on the unique circumstances of each case." Grievance Administrator v Deutch, 445 Mich 149, 166 (1997).

The widely varying facts in the three cases cited by the Administrator illustrate the wisdom of considering each case on its own merits. In Grievance Administrator v Miller, 123/89; 92-258-GA; 93-015-GA; 93-077-GA (ADB 1995), a hearing panel imposed a 37 month suspension for misconduct which included respondent's egregious sexual harassment of female employees, his false statement in an answer to a request for investigation and his causing a letter containing a false statement of material fact to be sent to the Attorney Grievance Commission by another person. On review, the Board increased discipline to a revocation of respondent's license in view of the additional misconduct established in two other cases consolidated for hearing. Looking only at the panel opinion imposing a 37 month suspension, however, it is clear that respondent Miller's conduct involved a pervasive pattern of sexual harassment toward several individuals over a sustained period and that the misconduct was substantially aggravated by the submission of false statements during the Attorney Grievance Commission's investigation.

Similarly, a disturbing pattern of misconduct was presented to the hearing panel in Grievance Administrator v James Childress, 97-169-GA; 97-183-FA. There, the panel found that respondent had forced sexual relations with a client. The panel entered a suspension for a period of five years, noting respondent's prior 180 day suspension for making inappropriate sexual advances and remarks to a client.

In the third case, Grievance Administrator v O'Rourke, 93-191-GA (ADB 1995), the Board affirmed a suspension of 180 days based upon the finding that respondent engaged in the uninvited and non-consensual touching of the genitals of a teenage boy in the locker room of a private club. That case, while it did involve the violation of certain norms of public morality, did not involve the misuse of an attorney-client relationship for personal gratification.

In short, the prior opinions which the parties have chosen to compare and contrast to the instant case demonstrate the inherent difficulty which would be presented by an attempt to fashion a one-size-fits-all level of discipline for cases in which the single common denominator is an attorney's sexual advance toward another person.

As the Board has previously said, "The fashioning of a discipline order is, at best, an inexact science requiring careful consideration of the unique circumstances of each case." Grievance Administrator v Stephen Moultrup, 93-197-GA (ADB 1995); Grievance Administrator v Sheldon Goldner, 98-036-JC (ADB 1999). This is especially true when, as in this case, the parties have not cited a sufficient number of factually similar cases from Michigan or other jurisdictions for the purpose of suggesting an identifiable range of discipline which could generally be expected for this type of misconduct. This does not mean, however, that the decision to assess a particular level of discipline is akin to drawing numbers from a hat.

One useful model for determining the level of discipline is embodied in the ABA Standards for Imposing Lawyer Sanctions compiled by the ABA Joint Committee on Professional Sanctions and adopted by the ABA House of Delegates in February 1986. That model requires a tribunal imposing sanctions to answer each of the following questions:

1. What ethical duty did the lawyer violate? (A duty to a client, the public, the legal system, or the profession?)

2. What was the lawyer's mental state? (Did the lawyer act intentionally, knowingly or negligently?)

3. What was the extent of the actual or potential injury caused by the lawyer's misconduct? (Was there a serious or potentially serious injury?) and

4. Are there any aggravating or mitigating circumstances?

When these questions have been answered, the tribunal following the theoretical framework provided by the ABA Standards may then consider whether discipline should fall within one of three broad categories: disbarment, suspension or reprimand. This determination, in turn, must also take into consideration the underlying purposes of the discipline to be imposed. The stated primary purpose of lawyer discipline in Michigan, as well as most other jurisdictions, is the protection of the public, the courts and the legal profession. MCR 9.105. However, our Court has recognized that deterrence is a legitimate consideration in the imposition of discipline. Matter of Grimes, 414 Mich 483; 326 NW2d 380 (1982). In other cases, the Board has stated that certain types of misconduct may require the imposition of a suspension, or a suspension requiring reinstatement, in order to send an appropriate message to the public and the legal profession that certain types of behavior must not be lightly tolerated. See, for example, Grievance Administrator v James M. Cohen, ADB 147-89 (ADB 1990). Similarly, the Board has ruled that certain types of misconduct, by their very nature, reflect adversely on a lawyer's fundamental honesty or integrity to the extent that public protection demands further inquiry into that individual's fitness to practice law during reinstatement proceedings. Grievance Administrator v Peter E. O'Rourke, supra, at p 6.

The Attorney Discipline Board does not lightly undertake the modification of a discipline order fashioned by a hearing panel. Those decisions, which are based upon the hearing panel's unique opportunity to observe the respondent's demeanor and to make assessments of his or her character, should always be given appropriate deference. Grievance Administrator v James M. Cohen, supra, at p 2.

Implicit in the hearing panel's decision in this case is the panel's determination that respondent's fundamental character and judgment have been called into question to such a degree that the burden must now be shifted to him to establish that he possesses those qualities of personal integrity which should be expected of all lawyers before he is allowed to resume the active practice of law. We are not persuaded that the hearing panel erred in that determination.

The Grievance Administrator has not petitioned for review and we are therefore not asked to consider whether greater discipline would be appropriate in this case. The only issue before the Board relating to the level of discipline is whether or not a suspension requiring reinstatement is appropriate. We conclude that such a suspension is appropriate in this case and the panel's decision is affirmed.

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

Board Member Grant J. Gruel did not participate.