Grievance Administrator,

Petitioner/Appellant,

v

Geoffrey N. Fieger, P 30441

Respondent/Appellee

Case No. 97-83-GA

Decided: August 12, 1999

BOARD OPINION

The Attorney Grievance Commission has filed a petition for interlocutory review of Tri-County Hearing Panel #69's opinion and order regarding the Commission's motion in limine. The motion sought a pretrial ruling from the panel that a section of the Revised Judicature Act, MCL 600.2106; MSA 27A.2106, applies in attorney discipline proceedings and, therefore, that an order of the Jackson County Circuit Court and an opinion of the Michigan Court of Appeals would be admissible thereunder. The panel determined that the circuit court order and the Court of Appeals opinion would be admitted at the hearing. However, based in part on the its reading of this Board's prior opinion in this matter, the panel also decided that it would not apply the portion of MCL 600.2106 providing that an authenticated "copy of any order, judgment or decree, of any court of record in this state . . . shall be prima facie evidence of . . . all facts recited therein." Because we find interlocutory review appropriate and conclude that MCL 600.2106 is applicable in these proceedings, we grant review and modify the opinion and order of the hearing panel.

Before we discuss the applicability of the statute in question, we will address the respondent's argument that this Board is not empowered to decide interlocutory petitions for review. Specifically, respondent argues that MCR 9.110(E)(4) limits the Board to reviewing final orders of discipline or dismissal by a panel. However, the Board may also "discipline and reinstate attorneys under these rules [Subchapter 9.100 of the Michigan Court Rules]." MCR 9110(E)(5). The rules provide elsewhere that:

> The administrator, the complainant, or the respondent may petition the board in writing to review the order of a hearing panel filed under MCR 9.115 . . . . [MCR 9.118(A)(1).]

Had the Court intended to preclude the Board from reviewing panel orders on an

interlocutory basis, the Court could have adopted a rule empowering the Board to review only "the order of a hearing panel filed under MCR 9.115[**(J)**]" (emphasis added), or otherwise restricting the nature of the orders reviewed. Instead, it provided that orders entered under MCR 9.115 may be reviewed by the Board.

MCR 9.115(A) states that "[e]xcept as otherwise provided in these rules, the rules governing practice and procedure in a nonjury civil action apply to a proceeding before a hearing panel." Pursuant to this rule panels may hear and decide various motions and take other actions not precluded by subchapter 9.100.

Finally, MCR 9.102(A) provides that procedures in matters conducted under subchapter 9.100 "must be as expeditious as possible," and MCR 1.105 provides that the Michigan Court Rules "are to be construed to secure the just, speedy, and economical determination of every action."

This Board has consistently entertained petitions for interlocutory review, and has granted such review when it appears that a decision by the Board prior to entry of a final order by the panel would likely be useful and consistent with MCR 1.105 and MCR 9.102(A). We see no reason to hold that we may not consider interlocutory review, but must, in all cases, require the parties to press on through hearing to a final order -- even where pretrial review of a panel determination could save the resources of the panel and the parties. Interlocutory review is often denied, but it occasionally makes sense, and we hold that the rules do not preclude the Board from granting it.

Next, we consider the applicability of MCL 600.2106 to attorney discipline proceedings, which are conducted under subchapter 9.100 of the Michigan Court Rules. The Grievance Administrator argues on behalf of the Commission that the statute applies in these proceedings. We agree.

The Michigan Rules of Evidence apply in attorney discipline proceedings. MCR 9.115(I)(1); MCR 9.115(A).[1]

The statute in question, MCL 600.2106; MSA 27A.2106, provides:

> A copy of any order, judgment or decree, of any court of record in this state, duly authenticated by the certificate of the judge, clerk or register of such court, under the seal thereof, shall be admissible in evidence in any court in this state, and shall be prima facie evidence of the jurisdiction of said court over the parties to such proceedings and of all facts recited therein, and of the regularity of all proceedings prior to, and including the making of such order, judgment or decree.

The Administrator relies heavily on MRE 101, which states:

> These rules govern proceedings in the courts of this state to the

[1] See also, Grievance Administrator v Frederick A. Patmon, 93-47-GA; 94-157-GA (ADB 1997), and Grievance Administrator v Paul Wright, ADB 126-87 (ADB 1988).

> extent and with the exceptions stated in Rule 1101. A statutory rule of evidence not in conflict with these rules or other rules adopted by the Supreme Court is effective until superseded by rule or decision of the Supreme Court.

Respondent identifies no conflict between the statute and a rule or decision of the Supreme Court. And the panel did not find such a conflict. However, the panel was not persuaded that the Court intended the statute to apply to discipline proceedings. Further, the panel emphasized its intention to abide by its reading of our previous opinion reversing the panel's grant of summary disposition and remanding this matter for a full hearing (i.e., for trial). The panel's concerns are worthy of discussion. However, we shall first address respondent's argument.

Respondent contends that decisions and rules applicable to criminal convictions "make it clear that MCL 600.2106 does not apply to disciplinary proceedings." However, the decisions cited do not establish that the Court considered the statute inapplicable in discipline proceedings. Respondent argues that the rule regarding criminal convictions would not have been necessary if the statute applied. But, the rule pertaining to criminal convictions does not duplicate the statute. Indeed, it serves a significantly different purpose.

MCR 9.120 provides that a certified copy of a judgment of conviction "is conclusive proof of the commission of the criminal offense" in a disciplinary proceeding based on a criminal conviction and commenced under that rule. As the Administrator concedes, MCL 600.2106 does not preclude the parties to a discipline (or any other) proceeding from relitigating the facts found by a court and recited in a court order. Rather, it serves to render a court order admissible, and to create a presumption that the order was properly entered and that the facts recited therein are accurate. As the Court of Appeals has explained in discussing the effect of a similar statute:

> Prima facie evidence is evidence which, if not rebutted, is sufficient by itself to establish the truth of a legal conclusion asserted by a party. . . . Statutory language making proof of one fact prima facie evidence of another fact is analogous to a statutory rebuttable presumption. [American Casualty v Costello, 174 Mich App 1, 7 (1989).]

No one here suggests that the statute would not apply in a civil bench trial in circuit or district court. Thus, by operation of MCR 9.115(A), and MCR 9.115(I)(1), the statute applies in discipline proceedings.

MCR 9.115(A) directs that "[e]xcept as otherwise provided in these rules, the rules governing practice and procedure in a nonjury civil action apply to a proceeding before a hearing panel." Evidentiary rules are rules of procedure. Perin v Peuler (On Rehearing), 373 Mich 531, 541 (1964). Also, MCR 9.115(I)(1) makes the Michigan Rules of Evidence applicable in proceedings before a hearing panel. In addition to MRE 101, cited by the Administrator, MRE 301 is pertinent here.

Under both of these rules, the Legislature may play a role in establishing presumptions in civil actions. Our Supreme Court has held:

> In Johnson v Secretary of State, 406 Mich 420, 432; 280 NW2d 9 (1979), we recognized the power of the Legislature to allocate the evidentiary burdens of the parties:
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> > The burden of producing evidence is not invariably allocated to the pleader of the fact to be proved. That burden may be otherwise allocated by the Legislature or judicial decision based, among other factors, on an estimate of the probabilities, fairness and special policy considerations, and similar concerns may justify the creation, judicially or by law, of a presumption to aid the party who has the burden of production. [McKinstry v Valley OB-GYN Clinic, PC, 428 Mich 167 (1987).]

The Supreme Court has "the exclusive constitutional responsibility to supervise and discipline Michigan attorneys." MCR 9.110(A); Const 1963, art 6, §5; Grievance Administrator v August, 438 Mich 296, 304; 475 NW2d 256 (1991). And the Court's rules of practice and procedure, including the Rules of Evidence, take precedence over conflicting statutes. MCR 1.104; MRE 101. Thus, the dispositive question is whether the statute conflicts with a rule or decision of the Supreme Court. MRE 101. Because this question and the panel's desire to be faithful to the Board's previous opinion in this case are somewhat interrelated, we shall treat them together.

The hearing panel's sensitivity to anything which might be viewed as truncating the record in this matter seems to be, understandably, grounded in our opinion reversing the grant of summary disposition and remanding this matter for a hearing.[2] For example, we noted in the opinion that "the Court has ultimate responsibility for discipline, and a full record may enable the Board and Court to better perform their respective functions."

However, we do not conclude that MCL 600.2106 conflicts with a Supreme Court rule or decision, or that its application must necessarily result in a record that is incomplete or unsatisfactory for purposes of attorney discipline proceedings.

Our Supreme Court frequently restates the basic proposition that "attorney misconduct cases are fact sensitive inquiries that turn on the unique circumstances of each case." Grievance

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[2] The panel stated:

> The well reasoned briefs by both sides make this matter a difficult issue. This panel would point out that the purpose of the Circuit Court's decision had to do with the underlying case and the sanctioning of not only the attorney, but also the attorney's client.
>
> We find that this is a matter of first impression and that there is no clear direction. It is our opinion, that in light of the Attorney Discipline Board's reversal, and its desire for us to have a "full hearing" to hear all of the facts, and in light of the matters pointed out in this opinion, that we can not admit the Circuit Court and Court of Appeals decision [sic] as prima facie evidence of all the facts cited therein. In the spirit of the Board's reversal, this hearing panel is desirous of a "full hearing."

Administrator v Deutch, 455 Mich 149, 166 (1997), citing In re Grimes, 414 Mich 483, 490; 326 NW2d 380 (1982). Thus, the Court has also made it clear that hearing panels must exercise "their critical responsibility to carefully inquire into the specific facts of each case" even when certain facts are conclusively established by a criminal conviction filed with the Board under MCR 9.120. Deutch, 455 Mich at 169.

However, as we noted above, discipline proceedings "must be as expeditious as possible." MCR 9.102(A). To this end, a hearing panel "may order a prehearing conference held before a panel member to obtain admissions or otherwise narrow the issues presented by the pleadings." MCR 9.115(F)(4)(d).

The foregoing principles announced in rules and decisions of the Court can be reconciled, and we must do so in matters involving criminal convictions, motions for summary disposition, and in other procedural contexts. As noted above, we do not find the Court's pronouncements to be in conflict with MCL 600.2106.

The Administrator has correctly pointed out that the facts recited in a court order are not incontestable. Thus, the statute poses no impediment to the development of a full record. However, where there is no actual dispute as to the facts recited, the statute promotes adjudicative economy and efficiency.

The Administrator states that "this statutory rule of evidence does not automatically provide for the admission of all prior court orders and opinions at a disciplinary hearing," and asserts that MRE 402 and 403 must nonetheless be met, and that they were met here. Further, the Administrator recognizes that "since the prior factual findings of the court are not conclusive, the parties to a disciplinary proceeding are entitled to supplement the record with any other relevant evidence they wish to present." Finally, the Administrator points out that respondent may argue that the facts recited by the court orders "do not amount to misconduct within the scope of MCR 9.104."

We wish to emphasize the latter point. Even if respondent cannot rebut the presumption, a panel must still determine whether there has been misconduct, and if so, whether it warrants discipline. The statute plays no role in determining whether the facts establish a violation of the Rules of Professional Conduct.

For the foregoing reasons, we conclude that MCL 600.2106 applies in attorney discipline proceedings, and we modify the panel's Opinion and Order Regarding Petitioner's Motion in Limine to so provide.

Board Members C. H. Dudley, Barbara B. Gattorn, Grant J. Gruel, Albert L. Holtz, Michael Kramer, Kenneth L. Lewis and Roger E. Winkelman concurred in this decision.

Board Members Elizabeth N. Baker and Nancy A. Wonch were absent and did not participate.