Grievance Administrator,

Petitioner/Appellant,

v

Eric H. Clark, P-31126,

Respondent/Appellee.

95-59-GA

Decided: April 24, 1997

BOARD OPINION

In a formal complaint filed on March 24, 1995, respondent was charged with alleged misconduct first reported to the Attorney Grievance Commission on September 18, 1991. Respondent filed a motion to dismiss based on delay in prosecution, and the panel granted the motion. We reverse the panel's order of dismissal and remand this matter for hearing.

Respondent allegedly represented the plaintiff in a personal injury action filed in the Wayne County Circuit Court on November 13, 1990. Following the voluntary dismissal of the circuit court complaint by respondent (on December 17, 1990), the client appeared through new counsel and moved to set aside the circuit court's order of dismissal. The defendant objected, and the circuit judge conducted an evidentiary hearing at which respondent, his client, representatives of defendant's insurance carrier, and a document examiner testified.

In a letter dated September 18, 1991, and received by the Attorney Grievance Commission on the following day, the circuit judge stated:

> On September 5, 1991, I ruled from the Bench that Mr. Clark settled the case for $15,000.00 without his client's approval and also signed his client's name to the settlement draft without the client's consent. I also believe that Mr. Clark backdated and/or added to notes in his file to cover up his conduct. I also

> believe that he lied under oath (and previously to his client) in claiming that representatives of the defendant's insurance carrier misrepresented to him the amount of insurance coverage available in the case. Mr. Clark also told his client that he had obtained a copy of the insurance policy Declaration sheet when in fact he had not. [R/I, pp 1-2.]

The letter indicates that a copy was sent to respondent.

On October 23, 1991, the judge's letter was forwarded to respondent with a request for his written answer pursuant to MCR 9.113(A). Respondent answered the request for investigation. The formal complaint was not filed with the Attorney Discipline Board until March 24, 1995.

The panel granted respondent's motion to dismiss, adopting respondent's arguments: (1) that he had "presented persuasive evidence . . . supporting his claim of prejudice"; (2) that the Grievance Administrator had failed to provide an explanation sufficient to justify the delay in light of the prejudice suffered by respondent; and, (3) that due process and the doctrine of laches required dismissal.

On review, the Administrator urges us to adopt a per se rule against the application of laches or the due process clause(s) as defenses to attorney discipline charges. The Administrator also argues, in the alternative, that even if delay in the prosecution of an attorney discipline case may justify dismissal in some circumstances, those circumstances are not present here. In particular, the Administrator points to the lack of evidence as to prejudice suffered by the respondent.

While we reject the notion that prosecutorial delay may never serve as the basis for the outright dismissal of an attorney discipline matter, we need not establish a definitive test here. We note, however, that at a minimum the elements a respondent would likely be required to show include a significant delay and a clear demonstration of substantial prejudice.

We agree with respondent that the appropriate response by this Board to an allegation of prosecutorial delay depends on the

particular facts of the case. As our Supreme Court held:

> The doctrine of laches reflects "the exercise of the reserved power of equity to withhold relief otherwise regularly given where <u>in the particular case</u> the granting of such relief would be unfair and unjust." [<u>Lothian v City of Detroit</u>, 414 Mich 160, 168 (1982); emphasis added.]

Unlike a statute of limitations, which bars actions based solely on the passage of time, the equitable doctrine of laches is concerned with "the effect of or prejudice caused by the delay." <u>Torakis v Torakis</u>, 194 Mich App 201, 205 (1992), lv den 441 Mich 905; <u>Lothian</u>, <u>supra</u>. "Laches is an equitable concept not governed by rigid rules" the application of which "depends on the facts of each case." <u>Baerlin v Gulf Refining Co</u>, 356 Mich 532, 535 (1959). However, Michigan cases appear to set forth three "elements" to a laches defense:

> A passage of time, prejudice to the defendant, and a lack of diligence by the plaintiff are the essential prerequisites to invoking laches. [<u>Torakis</u>, <u>supra</u>; see also <u>Badon v General Motors</u>, 188 Mich App 430 (1991).]

Thus, prejudice to the defending party is generally considered an indispensable prerequisite to invoking laches in circuit court. This is so in attorney discipline cases as well. See, e.g.: Anno, <u>Attorneys at Law: Delay in Prosecution of Disciplinary Proceeding as Defense or Mitigating Circumstance</u>, 93 ALR3d 1057, § 2, p 1063 (1979) ("generally . . . the determination of whether a delay constituted a defense in the disciplinary proceedings will be influenced by the amount of prejudice that the attorney suffered"); Suni, <u>Its About Time: A Proposal for Recognition of Statutes of Limitation in Attorney Discipline</u>, 1 Geo J Legal Ethics, 363, 366 (1987) (courts require "a showing of substantial prejudice to the accused" attorney). See also ABA/BNA Lawyer's Manual on Professional Conduct, pp 101:2113-15.

Respondent also analogizes to criminal procedure by citing cases analyzing prearrest or preindictment delay under the Fifth Amendment's Due Process Clause. See <u>US v Lovasco</u>, 431 US 783 (1977); <u>People v Bisard</u>, 114 Mich App 784 (1982). In <u>Lovasco</u>, the Court held that "proof of prejudice is generally a necessary but not sufficient element of a due process claim." 431 US at 790.

Construing Lovasco, the Michigan Court of Appeals adopted the Illinois approach: "once a defendant has shown some actual and substantial prejudice, the burden shifts to the prosecution to show the reasonableness of the delay." Bisard, 114 Mich App at 790. In requiring a strong showing of prejudice in most cases, Bisard is consistent with Lovasco's holding that "to prosecute a defendant following investigative delay does not deprive him of due process, even if his defense might have been somewhat prejudiced by the lapse of time." Lovasco, 431 US at 796.

Finally, respondent argues that the delay here amounted to a violation of his procedural due process right under the Fourteenth Amendment to have the opportunity to be heard at a meaningful time and in a meaningful manner. See Matthews v Eldridge, 424 US 319 (1976); In Re Charlton, 834 F Supp 1089 (ED Wis, 1993). In Charlton, the federal district court asked whether it is "fair to subject a lawyer to thirteen years of investigation and litigation regarding his alleged misconduct?" The court answered that "it depends on all of the circumstances," including the prejudice, if any, to the attorney in preparing his defense.

In this case, we have evaluated all of the circumstances, paying particular attention to respondent's claims of prejudice. Respondent is unable to point to sufficient prejudice to justify dismissal. He refers to the faded memories of two witnesses who "may be unable to present potentially exonerating testimony," and his own loss of memory. Respondent has not established that these witnesses would have been able to assist in his defense. Cf. Charlton, 834 F Supp at 1095. Further, the formal complaint substantially tracked the judge's letter which served as the request for investigation in this case. Respondent was on notice of the substance of the charges in September of 1991, and he could have then investigated and preserved evidence.

We also reject respondent's argument that he was prejudiced because he made financial commitments he would not have made had he known the formal complaint would be filed. Assuming this to be cognizable prejudice, we certainly cannot entertain the notion that respondent was entitled to disregard the pendency of a request for investigation -- particularly one involving such serious charges.

In conclusion, we do not find sufficient prejudice to require dismissal under any of the theories or authorities offered by respondent. Accordingly, we remand this matter for a hearing. In the event respondent is found to have committed misconduct, the delay in prosecution may, if appropriate, be considered by the panel as a mitigating factor. ABA, Model Rules for Lawyer Disciplinary Enforcement, Rule 32 and comment; ABA, Standards for Imposing Lawyer Discipline, standard 9.32.

Board Members Elizabeth N. Baker, C. H. Dudley, M.D., Barbara B. Gattorn, Miles A. Hurwitz, Michael R. Kramer, Kenneth L. Lewis, and Nancy A. Wonch concur in this decision.

Board Members Albert L. Holtz and Roger E. Winkelman were absent and did not participate.