STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellant

v

Geoffrey N. Fieger, P-30441,

Respondent/Appellee

94-186-GA

Decided: May 3, 1999

BOARD OPINION

This matter returns to the Board after having been remanded for hearing on Counts One and Two of the Amended Formal Complaint. Count One alleges that respondent made remarks about a prosecutor following the death of an inmate in the Ionia prison, such as: "The prosecutor has done nothing in this investigation. He's covering up a murder." Count Two alleges that respondent made certain statements about a judge in an unrelated matter. Following several days of hearing on remand, Tri-County Hearing Panel #75 dismissed both counts. The Grievance Administrator has filed a petition for review. He argues that Count One was erroneously dismissed and that the panel should have been disqualified. We affirm the hearing panel's order of dismissal based on the finding that the record contains insufficient evidence that respondent made "a statement that [he knew] to be false or with reckless disregard as to its truth or falsity." MRPC 8.2(a). Also, we conclude that the Panel Chairperson and Supreme Court did not err in denying the Administrator's request to disqualify the panel.

I. Background.

This matter has been the subject of two prior review proceedings. In our 1996 opinion ("Fieger I"), we reversed the hearing panel's grant of summary disposition pursuant to MCR 2.116(C)(10) (no genuine issue of material fact). Prior to the issuance of Fieger I, respondent

had filed an action in federal court seeking to enjoin these proceedings. See Fieger v Thomas, 872 F Supp 377 (ED Mich, 1994), remanded with instructions to dismiss, 74 F3d 740 (CA 6, 1996). District Judge Borman declined to grant the injunction. Judge Borman observed that "[w]hile the language of MCR 9.104(1)-(3) and MRPC 8.4(a)-(c), may raise concerns as to overbreadth and vagueness," 872 F Supp at 386, MRPC 8.2(a) expressly incorporates the First Amendment standard of New York Times v Sullivan, 376 US 254; 84 S Ct 710; 11 L Ed 2d 686 (1964), for criticism of public officials. Moreover, the court noted that

> in the paragraphs preceding each of the [counts in the formal complaint], the [Attorney Grievance Commission] has incorporated the New York Times v Sullivan standard into the charges, thereby narrowing the charges against Plaintiff in two significant ways.
>
> First, the AGC requires that Plaintiff's statements must have met the Sullivan standard, the statements must be false, and known by him to be false, or made with reckless disregard as to their truth or falsity.
>
> Second, by applying the Sullivan standard, the AGC acknowledges that Plaintiff can only be subjected to discipline for statements of fact, not statements of opinion since statements of opinion cannot be found to be false. [Fieger v Thomas, 872 F Supp at 384.]

In Fieger I, the issue on review was whether summary disposition was appropriate in light of the lack of discovery in discipline proceedings. Significant to this question was the nature of the proofs that would be dispositive. The parties agreed that respondent's state of mind could be critical, and we held:

> According to a leading commentator,[8] "Rule 8.2(a) incorporates the First Amendment standard for criticism of public officials, as articulated by the Supreme Court in New York Times v Sullivan and its progeny."[9] Although other rule violations are alleged against respondent, the Administrator appears to concede that discipline may only be based on statements regarding the integrity or qualifications of persons denominated in MRPC 8.2(a) if the scienter requirement of that rule, which is to say the actual malice standard of New York Times v Sullivan, is established. This is a proper concession. The rules of professional conduct are subject to the First Amendment. Moreover, if a specific rule governs the alleged conduct, its terms should take precedence over those of a more general rule.

[8] Geoffrey C. Hazard, Jr., who served as Reporter for the American Bar Association Special Commission on Evaluation of Professional Standards (Kutak Commission), which proposed to the ABA House of Delegates what eventually became the Model Rules of Professional Conduct.

[9] Hazard & Hodes, The Law of Lawyering (2d ed), §8.2:201, p 934. Although a literal reading of the second prong of the rule (proscribing statement made "with reckless disregard as to its truth or falsity,") may suggest that recklessness is disciplinable regardless of falsity, the commentators agree that "Rule 8.2(a) is limited to matters of fact that can be proven false, as is the case with libel and slander." Id.; see also Wolfram, Modern Legal Ethics, p 601 n 51, p 602 n 54.

[Fieger I, pp 8-9.]

We concluded our opinion in Fieger I by agreeing with the Grievance Administrator that summary disposition was inappropriate and holding that he must have an opportunity to prove actual malice, if that issue became dispositive. The opinion also indicated that proceedings on remand could include consideration of respondent's motion for summary disposition pursuant to MCR 2.116(C)(8) (failure to state a claim), since the issues presented therein had not been reached by the panel. The panel heard the motion. Respondent argued, among other things, that MRPC 8.2(a) violated the First Amendment. The Grievance Administrator replied that this was not so because "the standard of New York Times v Sullivan [is] incorporated right in 8.2," and he recognized that this would involve proving respondent's state of mind. But, the panel disagreed with the Administrator on this and other points, and granted summary disposition as to all three counts.

In a second review, the Administrator again acknowledged the applicability and importance of New York Times v Sullivan.[1] In our 1997 opinion ("Fieger II"), this Board

[1] See Grievance Administrator's Brief in Support of Petition for Review, filed February 6, 1997, pp 2, 6 (incorporating Federal District Judge Borman's saving construction of rules other than 8.2(a) and requiring New York Times v Sullivan standard to be met before discipline may be imposed under any rule set forth in formal complaint). Also, at the review hearing, counsel stated:

> Now the United States Supreme Court has clearly said in New York Times v Sullivan that those defamatory statements made with . . . actual malice are not constitutionally protected. And they define what they meant by actual malice[;] statements . . . known to be false or made with reckless disregard of the truth or falsity; made without reasonable investigation. That is the standard built in 8.2. That is the standard built into the rule promulgated by the Michigan Supreme Court. They recognized that constitutional limitation, and they have built it in. [Transcript of March 27, 1997 review hearing, p 10; emphasis added.]

To the extent the Administrator considered the phrase "made without reasonable investigation" to be consistent with the actual malice standard, this view was discussed at length and rejected by the Board in Fieger II.

affirmed the panel's summary disposition as to Count Three, and reversed as to Counts One and Two. We concluded that Counts One and Two stated claims upon which relief could be granted. We also agreed with the Administrator that Rule 8.2 was constitutional and again held that he must have an opportunity to present evidence of actual malice in support of Counts One and Two.

Rejecting the argument that the rules could not constitutionally prohibit statements that were knowingly false or made with reckless disregard for the truth, we followed New York Times' progeny and held:

> Consistent with the Rules' other proscriptions against lying, MRPC 8.2(a) prohibits an attorney from propagating falsehoods as to the qualifications or integrity of public legal officials when the attorney knows of the statement's falsity, or publishes the false statement "with reckless disregard as to its truth or falsity." In this context, "reckless disregard" means that the attorney "must have made the false publication with a 'high degree of awareness of . . . probable falsity,' . . . , or must have 'entertained serious doubts as to the truth of his [or her] publication.'" Harte-Hanks Communications, Inc v Connaughton, 491 US 657, 667; 109 S Ct 2678, 2686; 105 L Ed 2d 562 (1989). [Fieger II, pp 9-10.]

We then surveyed other decisions which formulated or restated the actual malice standard, such as this one from Bose Corp v Consumers Union, 466 US 485, 511 n 30; 104 S Ct 1949, 1965 n 30; 80 L Ed 2d 502 (1984):

> The burden of proving "actual malice" requires the plaintiff to demonstrate with clear and convincing evidence that the defendant realized that his statement was false or that he subjectively entertained serious doubt as to the truth of his statement. [Fieger II, p 18.]

Finally, in Fieger II, we concluded that the definition of actual malice, and its component "reckless disregard," are as well-settled as any legal principle. Yet, although the standard's scienter requirement is so deeply ingrained in American jurisprudence, we noted that some attorney discipline decisions from other jurisdictions either altered it or declined to apply it. A principal basis offered for this is "the state's substantial interest in maintaining public confidence in the administration of justice."[2] But, the Supreme Court has rejected the notion that the justice

[2] In Re Westfall, 808 SW2d 829, 836 (Mo, 1991), cert den 502 US 1009; 112 S Ct 648; 116 L Ed 2d 665 (1991).

system is entitled to be shielded from attacks.[3] Thus, finding the analyses in these opinions wanting, we concluded that the plain language of 8.2(a) and the First Amendment both compelled a straightforward application of the New York Times actual malice standard.[4]

In this review proceeding, the Administrator voices disagreement, at times, with Fieger II's determination:

> that when a claim of "actual malice" is based upon the allegation that the statement was made in reckless disregard of its truth or falsity, the question of "reckless disregard" must be evaluated according to a subjective standard, giving paramount consideration to the declarant's actual state of mind [Administrator's brief, filed June 3, 1998, pp 10-11; emphasis in original. But see oral argument: the rule "incorporates the standards of New York Times versus Sullivan."]

However, the Administrator accepts Fieger II as controlling at this point and argues that the panel's dismissal of Count One was nevertheless erroneous for two reasons: (1) the evidence presented was sufficient to establish New York Times actual malice; and, (2) the panel improperly concluded that one of respondent's statements was not actionable because it was an opinion. Before we address these questions, we will briefly revisit our decision to apply the New York Times actual malice standard to which the Administrator now objects.

---

[3] In New York Times, supra, the Court used judicial criticism cases to illustrate the broader principle that: "Injury to official reputation affords no more warrant for repressing speech that would otherwise be free than does factual error." 376 US at 272; 84 S Ct at 722. In other words, even if a statement is false, and "diminishes . . . official reputations," it is nonetheless constitutionally protected unless made with actual malice. 376 US at 273; 84 S Ct 722. And, in Landmark Communications, Inc. v Virginia, 435 US 829, 839; 98 S Ct 1535, 1541; 56 L Ed 2d 1 (1978), the Court stated that "the law gives judges as persons, or courts as institutions . . . no greater immunity from criticism than other persons or institutions" (internal quotation marks omitted).

[4] "'A well recognized rule for construction of statutes is that when words are adopted having a settled, definite, and well-known meaning at common law it is to be assumed they are used with the sense and meaning which they had at common law unless a contrary intent is plainly shown.'" Equitable Trust Co v Milton Realty Co, 261 Mich 571, 575; 246 NW 500 (1933). See also, Thomas v State Hwy Dept, 398 Mich 1, 9; 247 NW2d 530 (1976) ("Words and phrases which have acquired meaning in the common law are interpreted as having the same meaning when used in statutes dealing with the same subject matter . . . ."). The constitutional definition of "reckless disregard" was well known to Michigan lawyers and jurists before the adoption of Rule 8.2(a) in 1988. See, e.g., Postill v Booth Newspapers, 118 Mich App 608, 624; 325 NW2d 511 (1982), lv den 417 Mich 1050-1051 (1983) (opinion by then-Judge Riley defining "reckless disregard" by reference to New York Times and its progeny).

II. The meaning of MRPC 8.2(a)'s language: "reckless disregard as to [a statement's] truth or falsity."

The constitutional and nonconstitutional bases for our interpretation of MRPC 8.2(a) are set forth in Fieger II and, to a lesser extent, above. Although the Administrator has registered his disagreement with this interpretation, we are not now presented with a basis for interpreting the rule otherwise. In fact, since the decision in Fieger II, the American Law Institute gave its final approval to a section of the Restatement of the Law Governing Lawyers affirming that the New York Times actual malice standard applies to lawyer speech regarding public legal officials. See ABA/BNA Lawyers' Manual on Prof Conduct, Vol 14, No 8, p 213 (May 13, 1998).

It is difficult to see how the Restatement could articulate a different rule. The argument that discipline serves different interests than defamation law cannot overcome the United States Supreme Court's broad formulation of the New York Times rule: "even where the utterance is false, the great principles of the Constitution which secure freedom of expression in this area preclude attaching adverse consequences to any except for the knowing or reckless falsehood." Garrison v Louisiana, 379 US 64, 73; 85 S Ct 209, 215; 13 L Ed 2d 125 (1964) (emphasis added). See also, Hustler Magazine v Falwell, 485 US 46, 50-52; 108 S Ct 876, 879-880; 99 L Ed 2d 41 (1988) (applying New York Times to a claim for intentional infliction of emotional distress: "We have therefore been particularly vigilant to ensure that individual expressions of ideas remain free from governmentally imposed sanctions.") (emphasis added).

Attempts to categorize the New York Times standard as one pertaining to defamation rather than the First Amendment generally would be at odds with subsequent cases and with the decision itself: "The test is not the form in which the state power has been applied, but whatever the form, whether such power has in fact been exercised." New York Times, 376 US at 265; 84 S Ct at 718. The Court continued:

> [W]e are compelled by neither precedent nor policy to give any more weight to the epithet "libel" than we have to other "mere labels" of state law. N.A.A.C.P. v Button, 371 U.S. 415, 429, 83 S.Ct. 328, 9 LEd.2d 405. Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment. [New York Times, 376 US at 269; 84 S Ct at 720.]

Thus, the Court rejected the argument that New York Times should not apply to a criminal matter because criminal libel statutes are aimed at interests different from those targeted by defamation law. See Garrison, supra (applying New York Times in a criminal prosecution of an attorney who attacked the integrity of several judges). Even the interest of "preserv[ing] public confidence in the integrity of the government" is not sufficient to overcome the principles set forth in New York Times. In Re Advisory Opinion On 1975 PA 227, 396 Mich 465, 482; 242 NW2d 3 (1976).

Accordingly, given the broad applicability of the principles espoused in New York Times and the plain language of MRPC 8.2, we cannot see how Rule 8.2(a)'s reference to "reckless disregard as to [a statement's] truth or falsity" can have a meaning other than that ascribed by New York Times and its progeny.

III. Count One: The "Coverup" Statements.

A. Proceedings Before The Panel.

Much of the record evidence providing the background for respondent's statements is undisputed. We here summarize some of the evidence pertinent to the statements set forth in Count One.

On January 31, 1993, Eric Davidson was found dead in his cell at a maximum security prison in Ionia, Michigan. He had been transferred to Ionia a few days earlier after allegedly raping a guard at a regional correctional facility in Muskegon where he was serving sentences for second-degree murder, armed robbery, and rape. Davidson was found hanging with a bedsheet around his neck, a cloth in his mouth or throat, and tissue in his nostrils.

On February 10, 1993, an article appeared in the Detroit News under the headline: "Ionia prisoner's hanging death was no suicide, critics contend." In the article, the following remarks were attributed to one prisoner's rights advocate: "there should be an investigation into Davidson's death by sources outside the state 'to assure there is not a cover-up.'" Another prisoner's rights advocate was reported to have said that she believed Davidson was killed. She was quoted as saying: "There would be no reason for him to stick a towel in his mouth if he's already decided to commit suicide . . . I believe somebody jammed it in his mouth to muffle out his screams." Both of the prisoner advocates mentioned the possibility of retaliation by guards.

The February 10, 1993 Detroit News article also contained comments from State Police and Corrections spokespersons answering these remarks. The State Police officer said, on February 9, 1993, that the agency was "leaning toward ruling Davidson's death a suicide." Respondent was not quoted or mentioned in the article.

This matter first came to the attention of the Ionia County Prosecutor, Raymond Voet (complainant), when he read the February 10, 1993 Detroit News article while waiting for a flight at the airport. Voet testified that he immediately telephoned his chief assistant; he was concerned about the allegations in the article and believed that "we needed to look at this very carefully. . . . If there was a murder in our prison, I wanted to know about it." While out of town, Voet directed his chief assistant to obtain police reports and other documentation regarding the incident, and to procure the assistance of a forensic pathologist.

On February 13, 1993, another article appeared in the Detroit News under the headline, "Dead inmate's mom threatens suit: 'He did not . . . commit suicide.'" The article contained quotes from Davidson's mother, and respondent, who was said to be representing her. Also reported were denials of the murder allegation by a Department of Corrections spokesperson, and the following:

> Officials at the state police post in Ionia issued a terse news release:
>
> "An ongoing investigation into the Jan. 31 death of inmate Eric Davidson supports a preliminary finding that the death was self-inflicted. A medical examiner's report, evidence from the scene, witness accounts and preliminary laboratory results provide no evidence of foul play."
>
> But at a Thursday [February 11, 1993] news conference, Fieger cited Davidson's letter to his mother the day he died and other "questionable circumstances surrounding the inmate's death:[5]

[5] Six circumstances were listed: (1) "The towel and tissue from his mouth and nostrils were not given to the medical examiner, and have disappeared"; (2) "Davidson's body was not released to his mother until four days after his death, without explanation"; (3) "Someone other than the Ionia county medical examiner performed the autopsy"; (4) "There is no explanation for a pool of blood discovered beneath Davidson's body and that detail was omitted from the incident report"; (5) "There is reason to believe Davidson's hands were tied behind his back"; (6) "Davidson was housed in the less-secure of two units at Ionia Maximum Facility, even though he'd been accused of a serious felony less than a week before arriving at Ionia."

continued on following page

* * *

> Fieger said he plans to ask John Smietanka, U.S. attorney for western Michigan, to investigate.
>
> "I believe the state of Michigan is participating in a conspiracy to cover up a murder," Fieger said. [Respondent's Exhibit I, A.]

The Ionia Sentinel-Standard also carried coverage of the February 11 news conference in the February 12 edition of the paper.

Prosecutor Voet testified that he returned from his conference on Sunday, February 14, 1993. He went into the office on the following day, February 15, although the office was closed for the President's Day holiday. He consulted with his chief assistant, spoke with Dr. Cohle, a forensic pathologist who reviewed the evidence, and reviewed the state police report[6] and perhaps other evidence. Voet concluded that Davidson had committed suicide and, late in the morning, he issued a press release to that effect. On February 16, 1993, the Sentinel-Standard reported the prosecutor's conclusions in a story headlined: "Voet blasts attorney in Davidson case."

On February 20, 1993, the Sentinel-Standard ran an article containing the statements by respondent which remain at issue in this case.[7]

---

footnote 5, continued

Detective Sergeant Morey of the Michigan State Police testified that he checked out each of these assertions at the request of Prosecutor Voet and summarized his findings in a September 8, 1994 letter to Voet. He testified, for example, that item #1 is untrue, that item #4 is untrue for the reason that there was no pool of blood, and that there is no evidence of Davidson's hands being tied behind his back.

[6] Apparently, this was a preliminary report. Detective Sergeant Morey testified at the hearing that "[t]he report was prepared in steps over probably a six month period or longer" (Tr 1/19/98, p 139), but that the "initial report was prepared within the first week, week and a half" (id.). As of February 15, 1993, "[his] investigation was not complete yet" (id., p 158). He was "still very much into the investigation" (id.).

[7] The article reads, in its entirety:

ATTORNEY CLAIMS
VOET IN COVERUP

By JACK SPENCER
Night Editor
IONIA --An attorney, representing the family of an inmate who was found hanging in his Ionia Maximum Facility, (I-Max) cell, has accused Ionia County Prosecutor Raymond Voet of covering up a murder.

"Let him decide whatever he wants. As far as I'm concerned the prosecutor is engaged in a coverup," Geoffrey

continued on following page

At the close of his case, the Grievance Administrator voluntarily dismissed portions of Count One of the formal complaint (paragraphs 10(c)-(e)), leaving only these allegations in paragraph 10:

> a) [Respondent] stated, "As far as I'm concerned the prosecutor is engaged in a cover-up.";
>
> b) [Respondent] stated, "The prosecutor has done nothing in this investigation. He's covering up a murder."

Respondent rested without calling any witnesses.

Based on the February 20, 1993 Sentinel-Standard article, and the testimony of Jack Spencer, who authored the article, the panel found that the statement in paragraph 10(a) was made by respondent. The panel also found that "the statement was made about Raymond Voet, the Ionia County Prosecutor, a public legal officer falling within the protection of MRPC 8.2(a)."

---

footnote 7, continued

Fieger said Friday. "The prosecutor has done nothing in this investigation. He's covering up a murder."

On Jan. 31, Eric Davidson was found hanging by a sheet in his cell with a wash cloth in his mouth and tissue paper in his nose. He had been transferred to the prison after allegedly raping a female guard Jan. 27 at E.C. Brooks Regional Facility in Muskegon Heights.

Last week, Davidson's family, represented by Fieger, alleged Davidson was killed by prison guards in retaliation for the attack. They said they planned a $25 million lawsuit against the state Department of Corrections.

"All evidence in the case points to suicide," Voet said, in a news release Monday, adding that he would not pursue criminal charges in the case.

Voet said that he reached his conclusion based on what forensic pathologist Dr. Stephen Cohle told him after reviewing evidence.

Cohle reviewed all evidence from a state police investigation and autopsy report, but chose not to view the body, Voet said. Cohle said the lack of evidence of a struggle factored heavily in his conclusion.

In response to Fieger's "cover up" charge, Voet said, "Where's the evidence. If he has evidence, why

Continued on Page 3

--- I-Max hanging

Continued from Page 1

doesn't he produce it? If he produces it, I'll review it."

Fieger claimed an eyewitness to the attack had come forward, but he refused to disclose further information. He said Voet's decision had no bearing on the family's lawsuit.

Voet criticized Fieger Monday, for calling Davidson's death a murder and suggesting officials are involved in a cover-up. He also stated that Fieger's comments have increased tension with the state's prisons and undermined public confidence in the Department of Corrections and the Michigan State Police.

Fieger has said he has evidence to substantiate his claims but has declined to comment further.

Further, the panel found that

> an investigation was conducted, some of which was requested by Mr. Voet and/or his office, and that Mr. Voet did nothing to interfere with the investigation or to try to influence the persons who conducted the investigation with regard to their conclusions.

It is apparent that these findings also apply to the statement in paragraph 10(b) of the formal complaint. In fact, the Sentinel-Standard article places the statements in a single paragraph:

> "Let him [the prosecutor] decide whatever he wants. As far as I'm concerned the prosecutor is engaged in a coverup," Geoffrey Fieger said Friday. "The prosecutor has done nothing in this investigation. He's covering up a murder." [Respondent's Exhibit I, F.]

The panel found that the Grievance Administrator presented "absolutely no evidence" that respondent made these statements with the knowledge that they were false or with reckless disregard as to their truth or falsity. As to the statement set forth in paragraph 10(a) of the formal complaint ("As far as I'm concerned the prosecutor is engaged in a coverup"), the panel also found, in the alternative, that this "is a mere statement of opinion and therefore is not actionable." We do not address this alternative ground (i.e., whether the statements could reasonably be interpreted as assertions of fact) because it is not dispositive.

B. Is There Proper Evidentiary Support For The Panel's Finding That There Was Insufficient Evidence To Establish That The Statements Were Made With Knowledge Of Their Falsity Or Reckless Disregard For Their Truth Or Falsity?

1. The Actual Malice Standard.

A recent Michigan Court of Appeals decision involved claims of defamation, invasion of privacy, and intentional infliction of emotional distress against an attorney who made statements about a party in the course of representing her client. It contains the following definition:

> "Actual malice is defined as knowledge that the published statement was false or as reckless disregard as to whether the statement was false or not. Reckless disregard for the truth is not established merely by showing that the statements were made with

> preconceived objectives or insufficient investigation. Furthermore, ill will, spite or even hatred, standing alone, do not amount to actual malice. "Reckless disregard" is not measured by whether a reasonably prudent man would have published or would have investigated before publishing, but by whether the publisher in fact entertained serious doubts concerning the truth of the statements published." [Ireland v Edwards, 230 Mich App 607, 622; 584 NW2d 632 (1998), quoting, with citations omitted, Grebner v Runyon, 132 Mich App 327, 332-333; 347 NW2d 741 (1984).]

The Ireland case arose out of a bitterly contested and highly publicized custody dispute between Jennifer Ireland, who planned to enroll her daughter Maranda in day-care while she attended classes at the University of Michigan, and the child's father, Steven Smith. Ireland sued the father's attorney for twenty statements allegedly made to the media.[8]

In affirming summary disposition of the claims against the attorney, the Court of Appeals concluded that the statements concerning the amount of time the plaintiff-mother spent with the child (e.g., "Ireland was never home with the child," "Ireland abdicated all responsibility for the care and raising of this child to everybody") were "rhetorical hyperbole," and not actionable. Another statement ("Maranda suffered a fractured arm because of Ireland's neglect") was determined to be "not provable as false." 230 Mich App at 620. The remaining statements were disposed of by application of the actual malice standard, and the plaintiff's inability to produce the requisite evidence.

---

[8] The Court of Appeals recited the alleged statements:

> Four of the statements concerned plaintiff's fitness as a mother: "The fact is, this evidence overwhelmingly showed that Ireland was not a fit mother"; "[t]his case is about a woman who is not fit to raise her child and never spent any time with her child"; "[t]his woman has never been a mother"; and "Ireland is an unfit mother." Eight of the alleged statements involved the amount of time plaintiff spent with Maranda: "Ireland never spent a moment with the child"; "Ireland was never home with the child"; "[t]he trial evidence all showed that Ireland was never with Maranda"; "Ireland abdicated all responsibility for the care and raising of this child to everybody"; "[i]f the child were with her mother, as she has been in the past, that means the child would never be with her mother"; "[t]hat mother was never with her child"; "[i]t doesn't matter whether she stays home and takes college credits by telephone, she's still never going to be wit [sic] hr [sic] child. She never was"; and "Ireland was never with Maranda for the first three years of Maranda's life." Five of the alleged statements indicated that plaintiff was violent and abused Maranda: "Ireland abused her child"; "Ireland was violent and assaultive"; "Ireland has a history of violence and child abuse"; "Maranda suffered a fractured arm because of Ireland's neglect"; and "Ireland hit Maranda hard enough to leave bruises on Maranda's thigh, hip and other parts of Maranda's body." The remaining alleged statements were: "Ireland did not want to take Maranda to the University of Michigan with her"; "Ireland was a pathological liar"; and "Ireland is limiting her interviews because she is holding out for the tabloids to offer her big bucks for her tale."

2. The Administrator's Arguments.

The Administrator contends that the panel erred in finding he presented "absolutely no evidence" that the statements were known by respondent to be false or were made with reckless disregard of their truth or falsity. We need not conclude that there is "no evidence" in support of these allegations in order to sustain the panel's finding that the Administrator failed to meet his burden of proving actual malice. On review, the Attorney Discipline Board must determine whether the hearing panel's findings on the issues of misconduct have proper evidentiary support in the whole record. In re Daggs, 411 Mich 304, 318; 307 NW2d 66 (1981); Grievance Administrator v August, 438 Mich 296, 304; 475 NW2d 256 (1991). Actual malice must be proven by clear and convincing evidence. Bose Corp, supra.

The Administrator argues:

> Even under the "subjective standard" imposed by the Board, the hearing panel erred in concluding that "actual malice" was not established. The circumstantial evidence presented by Petitioner was more than sufficient to establish that Respondent made the statements either knowing them to be false or with reckless disregard for their truth or falsity. [Administrator's brief, p 11.]

The Administrator points to three pieces of evidence to establish his claim on review that the statements were made recklessly or with the knowledge that they were false.

First, it is argued that the February 20, 1993 Sentinel-Standard article "establishes a motive to attack an honest investigation which found that prison officials were not responsible for the death" because it shows that the statements were made while respondent was representing the family of the deceased inmate, a fact which is not in dispute. The article also states that respondent "said he has evidence to substantiate his claims but has declined to comment further." Second, the Administrator points to the testimony of Michigan State Police Detective Sergeant Michael Morey, which is characterized as follows: "Sgt. Morey testified that he submitted a request to Respondent, expressly requesting the evidence he had that the prosecutor was involved in criminal activity, but Respondent never replied to this request." Respondent objects that Morey was not even asked whether he received a reply. Respondent appears to be correct. Morey testified that after he read an article containing respondent's statements in the February 21, 1993 edition of the Grand Rapids Press, he wrote a letter to respondent requesting the identity of an alleged witness to Davidson's death. The question whether respondent ever

replied was not asked of Morey, and we do not find that he volunteered that no reply was received. Nonetheless, for purposes of analyzing this argument, we will assume that respondent did not respond to Morey's request.

Finally, we are directed to the testimony of Tammi Eldridge that she received a telephone call from respondent in August 1993 (several months after the statements at issue) requesting a copy of the investigative file in the Davidson matter. Ms. Eldridge further testified that she computed the copying charges, telephoned respondent's office with such sum, and never received payment or otherwise heard from respondent's office in this regard again.

Summing up, the Administrator argues that:

> These circumstances show that Respondent had a motive to be less than truthful in his statement, that he did not conduct any investigation of the Prosecutor's actions before making the statement, and that he really had no basis for the attacks on the Prosecutor's integrity at the time he made those attacks. His assertions that he had evidence to support his statements, and his subsequent failure to disclose such evidence at a time when it would have been only reasonable to do so, provide further evidence. [Administrator's brief, p 13.]

As to the contention that respondent "had a motive to be less than truthful," courts have consistently held that more than this kind of evidence is necessary to establish actual malice. See, e.g., Harte-Hanks Communications, Inc v Connaughton, 491 US 657, 667-668; 109 S Ct 2678, 2685-2686; 105 L Ed 2d 562 (1989) (publication to increase profits not sufficient to show actual malice).[9]

---

[9] "Although courts must be careful not to place too much reliance on such factors, a plaintiff is entitled to prove the defendant's state of mind through circumstantial evidence . . . , and it cannot be said that evidence concerning motive or care never bears any relation to the actual malice inquiry." Harte-Hanks, 109 S Ct at 2686. In the term prior to the issuance of Harte-Hanks, the Court explained:

> [I]n the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment. In Garrison v. Louisiana, 379 U.S. 64, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964), we held that even when a speaker or writer is motivated by hatred or illwill his expression was protected by the First Amendment:
>
> > "Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of the truth." Id., at 73, 85 S.Ct, at 215.
>
> [Hustler Magazine v Falwell, 485 US 46, 53; 108 S Ct 876, 880-881; 99 L Ed 2d 41 (1988).]

Further, respondent's status as attorney for the plaintiff in a wrongful death claim does not seem to support the conclusion that respondent would have a reason to avoid the truth. If it shows anything, such an interest shows the polar opposite. There is no percentage in pursuing baseless claims, at least not beyond nuisance value, and that approach subjects an attorney to sanctions. Nothing in the record suggests that respondent wanted to pursue losing claims. In fact, the testimony shows that when the prison guard alleged to have been raped by Davidson filed suit against his estate, the suit against the Department of Corrections was not filed, or if it had been filed, was dismissed.

Next, we consider the claim that respondent "did not conduct any investigation of the Prosecutor's actions before making the statement, and that he really had no basis" for attacking the prosecutor, as is said to be shown by his alleged failure to respond to a request for evidence in support of his statements. There are two problems with this argument. One is evidentiary. At most, the Administrator may have proved that respondent did not obtain the prosecutor's investigative file. However, this is not the same as proving that respondent conducted no investigation or that he had no support for his statements. Indeed, the extent of respondent's investigation was not probed when he testified, only briefly as to Count One, during the Administrator's proofs.[10] Moreover, it is well-established, as we noted in Fieger II, that failure to investigate by itself does not establish actual malice or reckless disregard. See, e.g., Ireland, supra, 230 Mich App at 622.

Even when both motive and failure to investigate are present, courts are indeed "careful not to place too much reliance on such factors." Harte-Hanks, 109 S Ct at 2686. See, e.g., Perk v Reader's Digest Ass'n, Inc, 931 F2d 408, 411 (CA 6, 1991) (claimed political bias, reliance on hostile sources, and failure to sufficiently investigate held insufficient); Postill v Booth Newspapers, Inc, 118 Mich App 608, 625-626; 325 NW2d 511 (1982), lv den 417 Mich 1050-1051 (1983) (political animosity and failure to investigate found insufficient to establish actual malice).

Motive, failure to investigate, and other evidence may be used to prove circumstantially what may never have been shown directly -- actual malice. However, "'[t]here must be sufficient evidence to permit the conclusion that the defendant *in fact* entertained serious doubts as to the

[10] However, respondent's February 11, 1993 statement, reported in a February 12, 1993 article (R's exhibit I, C) that "he has been unable to obtain an autopsy report," suggests that some investigative efforts were underway.

truth of his publication.'" Postill, 118 Mich at 624-625. Evidence of purposeful avoidance of the truth may provide a circumstantial route to such a finding. See, e.g., Harte-Hanks, supra; Perk, supra; and, Bressler v Fortune Magazine, 971 F2d 1226 (CA 6, 1992), cert den 507 US 973; 113 S Ct 1416; 122 L Ed 2d 786 (1993). However, purposeful avoidance of the truth is not shown, or even argued to be present, here.

Bressler involved an article which published allegations that an official of the Tennessee Valley Authority "tried to cover up the breach of safety standards" at a nuclear plant. In comparing the facts of St Amant v Thompson, 390 US 727; 88 S Ct 1323; 20 L Ed 2d 262 (1968), with those in Bressler, the court displayed a broad range of circumstances in which the actual malice standard affords its protection:

> If the televised reading of another's affidavit accusing an official of bribery does not constitute actual malice even when the reader relies solely on the affidavit and makes no attempt to verify the accusation, then the comparatively extensive research effort by the *Fortune* reporters here, which gleaned consistent statements from multiple reliable sources, compels us to conclude that actual malice cannot be found on this record.

3. Conclusion -- Dismissal of Count I.

The Administrator argues that the record contains evidence of either knowing or recklessly false statements by respondent. The Administrator is correct that circumstantial evidence is properly employed to prove actual malice. However, we find no error in the panel's conclusion that the evidence does not establish that the statements were made by respondent with knowledge of their falsity. Indeed, we would be inclined to agree that there is "no evidence" that this prong of the actual malice standard has been met.

The evidence of reckless disregard for the truth or falsity of the statements is also plainly insufficient. Again, the Administrator is correct that self-serving declarations of intent do not always carry the day. Such testimony can be overcome by compelling circumstantial evidence. But, the evidence identified by the Administrator on review does not show clearly and convincingly, or even by a preponderance, that any allegations of a coverup were made by respondent with reckless disregard for their truth or falsity.

We wish to make it clear that we do not endorse respondent's statements, especially in

light of the panel's finding -- amply supported in this record -- that Prosecutor Voet in fact did nothing to hinder investigation of the Davidson death or misdirect any investigators. Based on this record, we can only conclude that respondent was either wrong in his factual assertion, if he actually intended to charge the prosecutor with masking discovery of the truth, or he was grossly unfair in his rhetoric, if he did not intend to be taken literally. We agree that this reflects poorly on respondent in either case. But, we cannot agree with our concurring colleague that such failings are necessarily attributed to the profession as a whole.

Further, we have no choice but to live with the fact that preserving confidence in public institutions and the bar cannot, as a constitutional or practical matter, be accomplished by punishing this kind of speech.[11] That this is so does not mean that bad manners, rude conduct, uncivil speech, and unfair accusations will flourish. Those who behave like this pay a price. And after a time, one who makes unfounded or unproven allegations becomes relegated to a status much like that enjoyed by the boy who cried "wolf." Loss of credibility, especially in the practice of law, is no small sanction.

IV. Should The Panel Have Been Disqualified?

The Grievance Administrator also argues that the Board Chairperson erred in not disqualifying the hearing panel after the remand by the Board in Fieger II. The motion was filed on October 9, 1997, and denied by the Board Chairperson in an opinion dated October 22, 1997. On October 24, 1997, the Administrator filed a complaint for mandamus with the Michigan Supreme Court seeking an order of superintending control directing the Board to enter an order

---

[11] Institutionally compelled silence is not merely ineffectual. It backfires and harms the suppressing institution much more than critical speech ever could. Justice Black wrote that "an enforced silence, however limited . . . would probably engender resentment, suspicion, and contempt much more than it would enhance respect." Bridges v California, 314 US 252, 270-271; 62 S Ct 190, 197; 75 L Ed 1117 (1941). And, the New York Times Court, quoting Justice Brandeis, covered the same territory:

> "Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law--the argument of force in its worst form." New York Times, 376 US at 270; 84 S Ct at 720-721.

disqualifying the panel. The Court denied relief on October 31, 1997. Grievance Administrator v ADB, unpublished order of the Michigan Supreme Court, dated October 31, 1997 (Docket No 110771). The panel proceeded to hear the matter.

The memorandum opinion of the Board Chairperson denying the motion to disqualify the hearing panel is attached as an appendix. We find no error in the opinion and adopt it as our own.

For the foregoing reasons, the hearing panel's order of dismissal is affirmed.

Board Members Elizabeth N. Baker, C. H. Dudley, M.D., Barbara B. Gattorn, Grant J. Gruel, Albert L. Holtz, Michael R. Kramer, Kenneth L. Lewis, Roger E. Winkelman, and Nancy A. Wonch concur in this decision.

Board Member Barbara B. Gattorn, concurring separately.

I must agree that the record in this case does not establish a violation of MRPC 8.2(a). Whether recklessness is to be measured by the New York Times test or some objective standard, there must be sufficient evidence that the person alleged to have violated MRPC 8.2(a) departed from that standard. The proofs offered below seem only to have incidentally touched on the degree of investigation respondent undertook before making his "coverup" remarks about the prosecutor.

This is frustrating because I am left with the feeling from what I have reviewed that this respondent might possibly have had the requisite state of mind. It is fairly clear that he loves to hear his own quotes in the media, and is not too concerned about letting fairness, decency, or civility stand in the way of a good soundbite. To afford someone room for good faith disagreement, or to acknowledge that facts may not all be in, or that they may be inconclusive might not be front page news. It is too lawyerlike, and even though such honorable conduct could be joined with passionate advocacy, it is not respondent's way. We must accept that. But, we cannot accept a reckless disregard for the truth. I would not be surprised if respondent possessed such disregard, but I must agree that it has not been shown here.

Further, I am concerned for the institutions and individuals respondent so cavalierly impugns. Remarks such as this subject the legal profession to contempt, obloquy, censure and reproach, MCR 9.104(2). I recognize that this is somewhat archaic language which must be applied with care or else it will swallow up all of the more specific provisions of the Michigan

Rules of Professional Conduct. But, where reckless disregard has been shown, we ought to also consider the fact that careless remarks such as these cast a cloud over the profession and the legal system. The profession is implicated because the public sees that attorneys may level baseless accusations without consequence. The legal system (i.e., the courts and public legal officers) is robbed of the public confidence which is necessary for it to function. Finally, I believe that the willingness of a particular attorney to speak before thinking or investigating reflects adversely on that attorney's judgment and fitness as a lawyer.