STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellant,

v

Michael J. Riley, P 32233

94-185-GA

BOARD OPINION

On October 10, 1995, the Attorney Discipline Board entered an order of remand vacating the hearing panel order of dismissal dated March 15, 1995 and remanding this case to Muskegon County Hearing Panel #2 for a further hearing on the charges of misconduct in the formal complaint. The respondent filed an application for leave to appeal on or about October 31, 1995. The Supreme Court denied respondent's application for leave in an order entered July 29, 1996.

On October 21, 1996, Muskegon County Hearing Panel #2 entered its further opinion and order dismissing the formal complaint. The Attorney Discipline Board has considered the Grievance Administrator's petition for review and has conducted review proceedings in accordance with MCR 9.118, including a review of the entire record before the panel. We reverse the hearing panel decision entered October 21, 1996. Respondent is reprimanded.

In the order of remand dated October 10, 1995, we ruled that the hearing panel erred in dismissing this complaint at the conclusion of the Grievance Administrator's proofs. In that order, we explained:

> We VACATE the hearing panel's order and REMAND this matter to the panel for further proceedings. The record establishes that the respondent, a county prosecutor, made comments about a pending criminal case to the editor of a local newspaper before the jury had returned its verdict. Michigan Rule of Professional Conduct 3.6 does not require the petitioner to establish an actual intent to prejudice the trial proceeding but requires a showing that the lawyer "knows or reasonably should know

> that it would have a substantial likelihood of materially prejudicing an adjudicative proceeding." (emphasis added) Furthermore, we do not agree that the professional standards embodied by MRPC 3.6 are vitiated if the extra-judicial statements concern matters already released in "open court" or which have been the subject of prior news articles. A great deal of information may be discussed in the press or "open court" in a criminal matter which are nevertheless inadmissible as evidence and which may constitute grounds for a mistrial or reversal. The comments to MRPC 3.6 refer to the "guidance in this difficult area" which may be obtained from ABA Model Rule 3.6, including Model Rule 3.6(a)(5) which prohibits the extra-judicial dissemination of "information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial." The evidence presented by the Grievance Administrator, unless rebutted by the respondent, establishes a violation of MRPC 3.6. (emphasis added)

After conducting the hearing required by the order of remand, the panel ruled that respondent had met his burden of proof by rebutting the prima facie elements of misconduct established by the Administrator's proofs. We disagree.

Respondent engaged in a telephone conversation with a newspaper reporter about the then pending matter of People v Geise on the evening of January 17, 1994. Respondent stated his dissatisfaction with the trial judge's decision not to allow the testimony of two witnesses (the defendant's estranged adoptive son and an expert expected to testify on the subject of child sexual abuse syndrome). (Tr. p. 27-31). Respondent's statements, printed in the Lake County Star and Osceola Herald on Thursday, January 20, 1994 include:

> a) "We've known about this witness just about from the start. We wanted to find him. First we heard he had been in Georgia but we ended up locating him in Jackson Prison. . . At the time the witness told officials that he shot her because she wasn't treating him right as a

> Native American. But he shot her as she was entering his bedroom. We talked to him he told us some things, we brought him up here and he was ready to testify.";
>
> b) "I think judges are sometimes too concerned about potential reversals. All the cards in the criminal justice system seem to be stacked in favor of the defendants. It's frustrating I think the system should be more victim oriented."; and,
>
> c) "We train people to be experts in these areas and now we won't allow expert testimony. . .It's as if the system has no confidence in a jury to understand what it's hearing. I think putting more faith in juries would be a good idea."

(T. 82 at 4-18).

The jury began its deliberations in People v Geise on January 19, 1994. The jury concluded its deliberations on January 21, 1994, the day after the publication of respondent's comments.

At the remand hearing, respondent testified that he could not reasonably have known that his statements could have a substantial likelihood of materially prejudicing the case because he knew that the reporter worked for weekly newspapers which would not be published until Thursday, January 20, 1994 and he believed that the case would be concluded before then. In support of the reasonableness of this belief, respondent testified that 1) in his ten years as a prosecutor, he had never had a jury stay out more than one day before announcing a verdict; and, 2) he had not previously been involved in any cases involving the types of delay which occurred in People v Geise. The respondent further testified that it was in his best interest as county prosecutor to avoid a mistrial and subsequent retrial of such a high profile, politically charged case. The panel concluded that respondent had shown:

> Not only that he did not know but that there was no reasonable basis why he should have known that the statement would have a substantial likelihood of materially prejudicing an adjudicative proceeding.

Resondent's extra-judicial statements may not have been made under the circumstances usually found in the reported cases. Respondent's comments were not recorded and he was not speaking to radio or television reporters, to a wire-service reporter or to a reporter from a daily newspaper. However, respondent, an experienced prosecutor, could not reasonably have believed that his comments would not have a substantial likelihood of materially prejudicing the proceeding if they were transmitted to the jury. Respondent knew that the jury, which had heard two days of evidence, was scheduled to return for additional testimony and evidence the next day, January 18th. Respondent knew that he had not yet closed his case and that the defense had not yet indicated the nature and length of the case it would present.

In reviewing the panel's opinion, we must determine whether or not there is proper evidentiary support in the whole record for the panel's findings and conclusions Grievance Administrator v August, 438 Mich 296 (1991). In its order of remand, the Board ruled that the Grievance Administrator had established, prima facie, that respondent's conduct as charged in the complaint violated MRPC 3.6. The only issue before the panel on remand was whether or not respondent could successfully mount a defense. We conclude that respondent's further testimony on remand fails to meet that test.

The record below leads inescapably to the conclusion that respondent reasonably knew or should have known that his statements to the news reporter regarding a pending criminal case would have a substantial likelihood of materially prejudicing that case if disseminated by means of public communication. The only element of MRPC 3.6 on which there can be the slightest doubt is whether or not a reasonable person would have expected those statements to be disseminated by means of public communication. Respondent knew he was being interviewed on the telephone by a reporter for the local newspapers. He knew and expected that his comments about the case would be printed and disseminated locally in the Lake County Star and the Osceola Herald. Respondent's gamble that the case would be concluded prior to the publication of his statements does not constitute a defense. Moreover, in light of the nature of the

comments, the high profile nature of the case and the lack of any guarantee that the case would be concluded before the papers were published, we would characterize respondent's conduct as inherently unreasonable. Respondent's conduct violated MRPC 3.6 and discipline is warranted.

Level of Discipline

Under the circumstances presented in this case, we do not believe that it is necessary to remand this matter to a panel for a further hearing to determine the appropriate level of discipline. We take judicial notice that respondent has not been previously disciplined. There is nothing in the record to suggest that his conduct was characterized by any of the aggravating factors which are traditionally considered in an assessment of discipline. A suspension of respondent's license to practice law for any period would serve no useful purpose. A reprimand is appropriate in this case.

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

Board Members Albert L. Holtz and Kenneth L. Lewis dissenting:

We would affirm the hearing panel's decision. The hearing panel ruled that the respondent had presented sufficient evidence to rebut the prima facie showing that he "reasonably" should have known that his comments to the reporter would have a "substantial" likelihood of "materially" prejudicing the proceedings as those terms are used in MRPC 3.6. The issue before the Board on review is not whether respondent chose the wisest or safest course or how we would act under similar circumstances. Rather, the only issue on review is whether or not there was sufficient evidentiary support in the record for the panel's conclusion. Respondent's testimony constituted evidentiary support for the panel's exercise of its subjective judgment.

Board Member Michael R. Kramer did not participate in this decision.