Grievance Administrator,

Petitioner/Appellee, Cross-Appellant,

v

Glenn R. Stevens, P 36197

Respondent/Appellant, Cross-Appellee

95-240-GA

Decided: May 5, 1997

BOARD OPINION

The respondent petitioned for review of the hearing panel's decision ordering a suspension of 180 days. The panel also ordered that respondent implement an appropriate office management system and enroll in and complete a course in attorney/client ethics. Respondent asks that the order of suspension be vacated and that this matter be remanded to the hearing panel for a further hearing on the appropriate level of discipline. The Grievance Administrator filed a cross-petition for review and asks that the discipline in this case be increased to a suspension of at least one year. For the reasons stated below, we conclude that the hearing panel's findings and conclusions have proper evidentiary support in the whole record and they are affirmed. Respondent's claimed grounds for review do not warrant modification of the panel's decision. Neither are we persuaded that the discipline imposed is inappropriate under the circumstances. The suspension and conditions imposed by the panel are affirmed.

I. Facts

The eight-count complaint filed by the Grievance Administrator on November 6, 1995 alleges that respondent committed acts of professional misconduct involving three separate complainants. At the conclusion of the proceedings, the panel found that Paragraph 8(b) of Count 1; all of Count 2; Paragraphs 20(a) and 20(c) of Count 3; Paragraphs 28(a), (b), (c) and (e) of Count 5 and all of

Count 6 of the formal complaint were not established and those charges were dismissed. Dismissal of those charges is not

challenged on review and will not be discussed except to the extent that they include pertinent undisputed general allegations.

In March 1993, respondent was retained by a client (referred to here as Ms. Y) to bring claims for sexual harassment and discrimination against her employer, General Motors. At the time of the retention, respondent was informed by Ms. Y that she was under the care of psychiatrist and was on medical leave from her employment as the result of her emotional condition. It is undisputed that respondent and Ms. Y engaged in a consensual sexual relationship during their attorney/client relationship.

Based upon the evidence, the hearing panel found that respondent prejudiced his client's legal position by engaging in a sexual relationship with Ms. Y during their attorney/client relationship; failed to take action to reinstate her case after it was dismissed; failed to promptly advise her of the dismissal; falsely stated to the client that her case had been reinstated; and, after he was discharged, mispresented the status of the case to Ms. Y's new attorney.

Counts 3, 4 and 5 arise out of respondent's representation of Ms. W who was served with a complaint for divorce filed in Ohio in May 1994. Eight days later, Ms. W took the complaint to respondent and retained his services. In July 1994, the husband's Ohio attorney contacted respondent to advise that a default judgment had been entered in Ohio but that a property settlement could still be negotiated. The hearing panel sustained the charges in Count 3 that respondent failed to inform his client of opposing counsel's post-judgment offer to negotiate a property settlement and failed to make any settlement proposals on her behalf.

With regard to Count 4, the panel found that, despite his knowledge of the divorce proceedings in Ohio, respondent filed a complaint for divorce on Ms. W's behalf in Genesee County Circuit Court in June 1994 without disclosing to the Court the existence of the Ohio matter. The panel found that respondent assured his client that he would seek temporary support and continued health insurance for her but failed to do so, failed to have the summons and complaint served on the defendant husband and failed to inform his

client that the Genesee County case was dismissed for lack of service in September 1994.

The panel also sustained the charges in Count 5 that, having refiled the divorce action in Genesee County for Ms. W., respondent again allowed the case to be dismissed for lack of service.

Count 7 and 8 involve respondent's retention in July 1994 to bring land contract forfeiture proceedings. Respondent was retained by Ms. S to bring the proceedings based upon a power of attorney received from another individual. The panel found that respondent neglected the matter for approximately one year. The panel noted that despite an apparent dispute as to who was to obtain certain information, "It would seem that after a reasonable length of time, the respondent should have proceeded either to determine the identity of the tenant, request that the client do so, or proceed without the tenancy matter and deal only with the forfeiture. Respondent did nothing." (HP Report, June 11, 1996, p. 10.)

Finally, in considering the allegations in Paragraph 8 that respondent made false statements to the Attorney Grievance Commission in answer to Ms. W's Request for Investigation, the panel did not find that deliberate deception was intended:

> However, we find such a careless disregard of the facts, such a cavalier disregard of accuracy in responding and an apparent cavalier attitude toward the seriousness of a Request for Investigation as to constitute a misrepresentation in the response. (HP Report, June 11, 1996, pp. 10-11).

II. The Hearing Panel's Denial of Respondent's Motion for Summary Disposition

Before the first hearing, respondent filed a motion for summary disposition as to Paragraph 8(a) of Count 1. Respondent argued that the allegations in that paragraph that respondent's consensual sexual relationship with Ms. Y jeopardized her legal position failed to state a claim of professional misconduct under the court rules and rules of professional conduct cited in the formal complaint. The hearing panel denied respondent's motion. The

panel conducted evidentiary hearings in this matter on March 22, May 15 and May 17, 1996. Following the filing of the panel's report on misconduct on June 11, 1996, the panel conducted a separate hearing on discipline as required by MCR 9.115(J)(2). The panel's order of suspension with conditions was issued December 2, 1996.

The issues presented in the respondent's petition for review and the Grievance Administrator's cross-petition are discussed as follows:

Respondent's motion for summary disposition under MCR 2.116(C)(8) was directed to Count 1, Paragraph 8(a) which states:

> 8. Respondent violated his duties and responsibilities, as follows:
>
> > a) Although the nature of [Ms. Y's] claim against General Motors was sexual harassment/discrimination, and despite his knowledge that [Ms. Y] was under the care of a psychiatrist as the result of those employment circumstances, he engaged in a sexual relationship with [Ms. Y] in the course of their attorney/client relationship, thereby jeopardizing her legal position.

Paragraph 9 of Count 1 then alleges that respondent's conduct as set forth in the preceding paragraphs of Count 1 constituted professional misconduct in violation of MCR 9.104(1-4) and the Michigan Rules of Professional Conduct (MRPC): 1.1(c); 1.3; 1.4(a); 3.2; 4.1; 6.5(a); and 8.4(a-c).

Respondent argued to the panel that those court rules or rules of professional conduct cited by the Grievance Administrator do not specifically prohibit a consensual personal relationship, sexual or otherwise, between an attorney and client.

In answer to respondent's motion, the Grievance Administrator asserted:

> As an attorney subject to the rules and regulations of the Michigan Supreme Court, respondent admits his duty and responsibility to avoid engaging in conduct that could prejudice or damage a client's interests and to refrain from conduct contrary to justice, ethics or good morals and conduct subjects the

> legal profession to obloquy, contempt, censure or reproach. (GA Answer to Motion for Summary Disposition, p. 4.)

Nowhere in the Administrator's pleadings filed with the panel or the Board does the Administrator identify the court rules or rules of professional conduct under which the conduct described in Paragraph 8(a) is specifically charged as professional misconduct.

Although not identified, the above-quoted argument from the Administrator's answer to motion for summary disposition does track the language of two rules cited in the complaint. MCR 9.104(2) prohibits conduct "that exposes the legal profession or the court to obloquy, contempt, censure or reproach." MCR 9.104(3) prohibits conduct that is "contrary to justice, ethics, honesty or good morals."

The third "duty" identified in that argument--the avoidance of conduct that could prejudice or damage a client's interest--is hortatory language with which we agree in principle but which does not appear in a rule cited in the complaint. Unlike Canon 7, DR 7-101(A)(3) of the former Michigan Code of Professional Responsibility which referred specifically to intentional prejudice or damage to a client during the course of the professional relationship, there is no precise counter-part to that language in any of the rules cited in the complaint against respondent.

In its order of May 3, 1996 denying respondent's motion for summary disposition, the panel ruled:

> The panel finds that a sexual relationship can be factually determined to be a griveable offense even without a specific prohibition. We find that such conduct is arguably contained within the general language of the applicable sections of the rules in the same manner as other conduct is determined to be grievable without specific prohibition.
>
> We find the formal complaint alleges that under the circumstances the sexual relationship placed the client's legal rights in jeopardy.
>
> Therefore, the Grievance Administrator may, and is required to, proceed with proofs adequate to establish that the sexual

> relationsihp did in fact prejudice the client's legal rights.

It is axiomatic that a finding of professional misconduct must be preceded by fair notice to the respondent. In re Ruffalo, 390 U S 544 (1968); Grievance Administrator v Freid, 388 Mich 711 (1972). However, as Professor Wolfram[1] points out, the notice pleading concept in discipline proceedings resembles modern pleading rules and requires notice only of the course of conduct to be examined.[2]

It would have been helpful to respondent and the hearing panel, and perhaps the better practice, for the Administrator to have identified the specific rules allegedly violated by the charges in paragraph 8(a). Nevertheless, we are unable to conclude that the hearing panel erred in denying respondent's motion for summary disposition. Respondent's assertions that his conduct did not jeopardize his client's legal position presented factual issues to be decided at trial. The absence of a specific rule prohibiting sexual relations between an attorney and client would not necessarily preclude a finding of professional misconduct.

In its opinion on misconduct issued June 11, 1996, the panel distinguished "conduct" by an attorney that prejudices the client's case from the narrow category of "sex with a client" as grounds for discipline. Although we affirm the panel's denial of the motion for summary disposition, we also affirm its conclusion that the proofs did not establish that the consensual sexual relationship itself constituted grounds for professional discipline in this case. This is not because of the nature of respondent's relationship with his client but because of the extemely 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

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[1] Wolfram, Modern Legal Ethics, Practitioner's Edition, Sec. 3.4, p. 102.

[2] We do not address here the question of whether specific notice is required of the precise rule that was allegedly violated. See Phelps v Kansas Supreme Court, 622 F2d 649, 650-51 (10th Cir 1981), cert den 456 U S 944, 102 SCT 2009; 72 L. Ed 2nd 466 (1982) (notice not required as to precise rule in the lawyer code). Contra Attorney Grievance Commission v Brewster, 280 MD 473; 374 AT2nd 602 (1977). (Statement in notice of charges that conviction violated one provision of code limited theory of prosecution to that provision.)

violate certain rules of professional conduct, those rules were not charged in this complaint.

We cite with approval Formal Opinion #92-364 of the American Bar Association (1992). The ABA's Committee on Professional Ethics stated:

> The Committee has been asked whether a lawyer violates the ABA Model Rules of Professional Conduct (1983, Amended 1991) or the ABA Model Code of Professional Responsibility (1969, Amended 1980) 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 role 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 applicable to a sexual relationship between a lawyer and client. Each model rule cited by the Committee has an identical counter-part in the Michigan Rules of Professional Conduct. They are: MRPC 8.7(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 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].

Inexplicably, although the Grievance Administrator presented ABA Formal Opinion #92-364 as authority for the proposition that the conduct alleged in Paragraph 8(a) constituted professional misconduct, the rules cited in that ethics opinion and the rules cited in this complaint are mutually exclusive. The Formal Complaint fails to charge respondent with a violation of any of the rules identified in the ethics opinion. The ethics opinion, in

turn, does not mention the Model Rule equivalent of any of the rules charged in the complaint. ABA Formal Opinion #92-364 provides an excellent framework for an analysis of the ethical pitfalls inherent in such a relationship between an attorney and client. That framework was not utilized in drafting this complaint.

In Drucker's Case, 577 A2d 1198 (NH 1990), the Supreme Court of New Hampshire affirmed a judicial referee's findings that an attorney's sexual relationship with a client violated certain rules of professional conduct. That decision relied upon three rules with identical counter-parts in the Michigan Rules of Professional Conduct: 1) Rule 1.7(b), by representing a client when the representation was materially limited by his own sexual interest in the client; 2) Rule 1.8(b), by using information about the client's fragile emotional state and mental disorder to her disadvantage by engaging in sexual relations with her, leading her to suffer emotional turmoil; and, 3) Rule 1.14(a), by failing to maintain a normal attorney/client relationship with the client knowing that she was in a fragile emotional state.

The Grievance Administrator cited Drucker in his arguments to the panel and the Board. It does indeed appear to be on point factually. Respondent's relationship with Ms. Y during his representation, accompanied by his knowledge of potential emotional vulnerability could, arguably, have supported findings that his conduct violated MRPC 1.7(b), MRPC 1.8(b) and MRPC 1.14(a). As with the ABA opinion, however, the applicability of Drucker to this case is undercut, if not completely nullified, by the fact that respondent Stevens was not charged under any of the rules discussed in Drucker and respondent Drucker was not charged with any of the rule violations which appear in the instant case.

Responding to an inquiry on this phenomenon, the Administrator's counsel noted during oral arguments that the New Hampshire Supreme Court had not adopted a counterpart to MRPC 6.5. Counsel speculated that had such a rule existed at the time in New Hampshire, that would have been the rule violation cited in Drucker. (Brd. Rev. Hrg. 3/27/97, p. 27).

MRPC 6.5(a), adopted by the Michigan Supreme Court, effective October 1, 1993, states:

> (a) A lawyer shall treat with courtesy and respect all persons involve in the legal process. A lawyer shall take particular care to avoid treating such a person discourteously or disrespectfully because of the person's race, gender, or other protected personal characteristic. To the extent possible, a lawyer shall require subordinate lawyers and non-lawyers assistance to provide such courteous and respectful treatment.

We find nothing in the comment to that rule, nor has our attention been called to any authority, which suggests that MRPC 6.5(a) is applicable to respondent's conduct as described in Paragraph 8(a). The connection between a rule prohibiting discourteous treatment based on gender and an attorney's sexual relationship with a client during the period of representation is too tenuous to support a finding of misconduct under that rule.

In short, the authorities cited by the Administrator, specifically ABA formal opinion #92-364 and Drucker's Case, supra, provide a detailed road map for the presentation of charges based upon an attorney's sexual relationship with a client during the period of representation. The complaint in this case proceeds down a different, murkier, path and, with regard to Paragraph 8(a), does not reach the intended destination.

Respondent's other acts of misconduct in this case are well pled and fully supported by the record. This is a case in which we consider the appropriate level of discipline for respondent's neglect of client matters, his failure to seek his clients' lawful objectives; his failure to act with reasonable diligence and promptness; and his misrepresentations to his clients, another attorney and the Attorney Grievance Commission. It is not, however, a case in which discipline is imposed for respondent's sexual relationship with a client or for discourteous conduct based upon gender and it should not be cited as such.

III. The Findings of Misconduct as to Paragraphs 20(b), 24(a-d), and 28(d)

Respondent seeks review of the hearing panel's findings related to the COBRA benefits at issue in Ms. W's divorce action. Specifically, respondent argues that the misconduct alleged in Paragraphs 20(b), 24(a-d) and 28(d) are without evidentiary support and should therefore be dismissed.

In reviewing a hearing panel's findings, we must determine whether there is proper evidentiary support for those findings in the whole record. The Board will not substitute its judgment for that of the panel below which had the opportunity to observe and assess the demeanor and credibility of the witnesses. Estes v State Bar Grievance Administrator, 393 Mich 645 (1974); Grievance Administrator v David N. Walsh, DP 16/83 (1984).

The panel was presented with conflicting testimony and it made determinations based upon credibility. The credibility of the witness and the weight to attach to each person's testimony, including the testimony of respondent, is for the panel to determine. Matter of Daggs, 411 Mich 304, 314 (1981). The record in this case supports the hearing panel's findings of misconduct. The sub-paragraphs enumerated by respondent allege acts or omissions which may be described generally as neglect, failure to seek a client's lawful objections and lack of adequate communication. The testimonial support for the panel's findings with regard to those sub-paragraphs is noted, with page citations, in the Grievance Administrator's reply brief.

IV. The Relationship Between Former AGC Counsel Joan Vestrand and Attorney Lucetta Franco

At the hearing before the panel on May 15, 1996, the Grievance Administrator's counsel, Joan P. Vestrand, called attorney Lucetta V. Franco for direct examination on the subject of Ms. Franco's representation of Ms. Y. Ms. Franco testified that she was contacted by Ms. Y, about Ms. Y's claim against General Motors and her dissatisfaction with respondent's representation. Ms. Franco testified that she called respondent to inquire about the status of

Ms. Y's claim and was told by respondent that a suit had been filed. Ms. Franco testified that this information was transmitted to Ms. Y who then made her own inquiry to the Genesee County Circuit Court. Under cross-examination by respondent's counsel, Ms. Franco disclosed that although she subsequently represented Ms. Y in a malpractice case against respondent, she declined to represent Ms. Y in a claim against General Motors. Ms. Franco was not called as a expert witness.

Respondent now asks that the Board take notice that 1) AGC counsel Joan Vestrand left the employment of the Grievance Commission in August 1996; 2) that attorney Franco filed a law suit on Ms. Vestrand's behalf in approximately November 1996 for matters related to Ms. Vestrand's employment at the AGC; and, 3) that at sometime subsequent to the hearings before the panel, Ms. Franco also entered into attorney/client relationships with complainants Ms. S and Ms. W.

Respondent speculates that Ms. Franco may have consulted with Ms. Vestrand, Ms. S or Ms. W at some time prior to, or contemporaneous with, her testimony on May 15, 1996. This appears to be conjecture on respondent's part. More importantly, respondent has not established how such relationships, if true, resulted in a denial of due process. There is no claim that Ms. Franco's representation of Ms. Vestrand and Ms. Y were related in any way. The conclusory claim that Ms. Franco's attorney/client relationships with the complainants and/or Ms. Vestrand raise issues of credibility is neither explained nor supported in the record.

Included in this section of respondent's brief is an unrelated argument based upon an affidavit of Jimmy Anderson dated December 12, 1996. Mr. Anderson was called as a witness by the Grievance Administrator and testified to the panel on March 22, 1996. We are not persuaded that the Anderson affidavit establishes good cause to remand this matter to the panel to receive further evidence.

V. Evidence Submitted by Respondent at the Hearing on Discipline

Respondent argues that the panel erred in failing to consider various letters from judges and lawyers regarding respondent's reputation and abilities. Respondent further argues that the panel failed to give sufficient weight to the mitigating effect of respondent's subsequent settlement of the malpractice claim against him by Ms. Y. The record reflects that these letters were admitted into evidence by the hearing panel with an acknowledgment from the panel's chairperson that a proper foundation for their admissibility had not been laid but that the letters would be received for "whatever value we can assign to them", (Tr. pp. 5-7). As for respondent's settlement with Ms. Y, both parties had an opportunity to present their arguments to the panel regarding the aggravating or mitigating effect of that settlement.

The hearing panel was not required to assign numerical or percentile values to the aggravating and mitigating factors which it considered in its final assessment of discipline. Respondent's argument that the panel failed to give "sufficient" weight to specific mitigating factors is rejected.

VI. Level of Discipline

The Grievance Administrator asks that the six-month suspension imposed by the hearing panel be increased to a suspension of one year or more. The Administrator first argues:

> If only the misconduct before this Board was that which occurred during [Ms. Y's] matter, a suspension for a period of years would be in order. Respondent exploited Ms. [Y's] vulnerability and engaged in a sexual relationship prejudicing her interests. (GA Brief in Support of Petition for Review pp. 4-5).

In support of this argument, the Administrator relies exclusively on two authorities: ABA Committee on Ethics and Professional Responsibility, Formal Opinion #92-364 (1992); and Drucker's Case, 133 NH 326; 677 A2d 1198 (1990). As we have discussed earlier in this opinion, the applicability of those

authorities is extremely limited here since none of rule violations discussed in the ABA opinion or Drucker were found or charged in the instant case.

This is not to say that Ms. Y's vulnerability or the resulting prejudice to her case were not properly considered in aggravation. The American Bar Association's Standards for Imposing Lawyer Sanctions (1986), for example, recognizes potential or actual injury caused by a lawyer's misconduct and vulnerability of the victim as factors to be considered when imposing discipline. See Standards 3.0; 9.22(h). Ms. Y's emotional vulnerability and the resulting prejudice to her claims were present to some degree in the context of the remaining charges in Count 1. The panel's report makes it clear that these factors were considered by the panel along with such other important factors as an apparent pattern of misconduct and respondent's misrepresentations to a client, another attorney and the Attorney Grievance Commission.

As we have noted before, the formulation of discipline in a particular case is far from an exact science.

> The Attorney Discipline Board's power to modify the discipline imposed by a hearing panel should be exercised with some discretion. In that respect, the Board's supervisory role over its appointed hearing panels is not unlike the Supreme Court's authority to change the discipline imposed by the Board. In discussing that authority, the Court stated that "We invoke this power only if the disciplinary action imposed by the Grievance Board is inappropriate." [Citations omitted.]

Grievance Administrator v Polizzi, 95-69-JC (ADB 1996)

Our inclination to give deference to a panel's assessment of discipline is strengthened where, as in this case, the hearing panel's report includes a discussion of the aggravating and mitigating factors considered by the panel and where it appears that those factors have evidentiary support in the record.

Our paramount concern in reviewing the appropriate level of the discipline is the protection of the public, the courts and the legal profession. We conclude that the hearing panel's order of

suspension in this case, which includes corrective conditions and requires respondent to establish his fitness to practice law in separate reinstatement proceedings, achieves that goal.

Board Members Elizabeth N. Baker, C. H. Dudley, Albert L. Holtz, Miles A. Hurwitz, Michael R. Kramer, Roger E. Winkelman and Nancy A. Wonch.

Board Members Barbara B. Gattorn and Kenneth L. Lewis were absent and did not participate.