STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellant,

v

Eric H. Clark, Respondent/Appellee,

Case No. 95-50-GA.

Decided: September 22, 1999

BOARD OPINION

This matter arises from respondent's representation of a client with respect to injuries sustained in an automobile accident. Tri-County Hearing Panel #31 found that respondent settled the matter upon receiving oral representations from insurance carrier representatives that the pertinent policy limits were $20,000. Thereafter, it was learned that the policy in fact afforded significantly greater coverage. The client retained another attorney who sought to set aside the dismissal of the circuit court case which was entered in connection with the settlement. Initially, successor counsel relied upon the argument that the settlement and dismissal were procured by insurance company fraud. Later, however, he also claimed that respondent entered into the settlement without his client's authority.

The Grievance Administrator filed a four count formal complaint against respondent alleging various specific acts of misconduct. The panel conducted a hearing over the course of several days. The panel issued a report finding that the Administrator failed to sustain his burden of proof as to each of the four counts, and an order dismissing the formal complaint was issued. The panel specifically noted that its "[f]inding is limited to the allegations contained in the . . . Formal Complaint and in no way should be construed as an endorsement of the way Respondent investigated the coverage issues involved in the underlying personal injury claim." Report, pp 3-4.

The Administrator appeals, seeking only to overturn the panel's findings with respect to one of the five allegations in Count Four. For the reasons explained below, we affirm.

The crux of the Administrator's argument is that the panel erred in failing to find that respondent made certain notations in his file with the intent to mislead the circuit court at an evidentiary hearing held in connection with successor counsel's motion to set aside the dismissal. The Administrator argues, in part, that the panel gave insufficient weight to "lies" by respondent in a deposition conducted prior to the evidentiary hearing. Respondent argues that the deposition

transcript was improperly admitted by the hearing panel and should be disregarded.

We need not delve into the evidentiary question. It appears that the transcript was properly admitted either as a party admission, MRE 801(d)(2)(a), or simply because it was not offered to prove the truth of the matter asserted therein, MRE 801(c), but rather to establish an allegation that respondent was lying. Respondent's declarations that certain notes were made contemporaneous with certain telephone conversations appear to be nonhearsay.[1] However, the admissibility of the deposition transcript is not dispositive. Even with it in the record, we are not persuaded that the panel's dismissal was erroneous.

Respondent argues that the formal complaint does not allege the misconduct that the Administrator now claims the panel should have found. We agree.

The Administrator contends that the emphasized portion of the following passage from the panel's report is in error:

> The Panel learned at the conclusion of this hearing that Mr. Watson, Respondent's client, retrieved the file from Respondent in early April, 1991, a full five (5) months before this matter went before the Circuit Court. Mr. Cheatham then had custody of the file for purposes of having Mr. Speckin do ESDA testing. The question as to when these entries were made by Respondent remained a mystery to the Panel and while it may have been a mistake or error in judgment for Respondent to have made entries in the file in February, March or early April, 1991, there is no question that he turned over the file to successor counsel David Ravid in April, 1991. **There is no nexus between these entries and Petitioner's assertion that Respondent made said entries to mislead the Court.** [Panel Report, pp 5-6; emphasis added.]

This emphasized portion, and the report as a whole, can only be read as a finding that intentional misrepresentation by the respondent had not been proven. On review, the Administrator outlines respondent's motive to backdate or alter his file notes to indicate that he had been told policy limits were $20,000 (he would have known that he was likely to be called as a witness in proceedings to reinstate the client's suit based upon the carrier's misrepresentations as to the policy limits). The Administrator also points out that respondent has consistently maintained (in his

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[1] If the Administrator offered the transcript of respondent's former testimony to prove that respondent lied under oath and/or to a court, in violation of the Rules, then the statements would be admissible as "verbal acts," 5 Weinstein's Federal Evidence (2d ed), §801.03[2], pp 801-12.3 -- 14 (verbal act is an "utterance that is an operative fact that gives rise to legal consequences"). See also, Wade & Kolenda, Michigan Courtroom Evidence, (3d ed), p 8-6 ("Statements that are part of a matter at issue" not excluded as hearsay). Common examples are defamatory statements, illegal solicitations (e.g., bribes or solicitations to commit crime), notices, misrepresentations, threats, and contracts. These statements are admitted because they have independent legal significance; they are not admitted to prove the truth of the matters asserted. Indeed, here, it has been the Administrator's position that respondent's deposition testimony was, in one respect or another, untrue. The panel may have agreed that some of respondent's testimony was inaccurate, but it has obviously not embraced the Administrator's assertion that the evidence can only be seen to establish an intent to mislead.

deposition and before the panel) that his notations were made contemporaneous with the dates thereon, but that the panel found otherwise based on the testimony of the document examiner. The gist of the argument is that respondent lied about the backdating, and that the panel should have found an intent to mislead.

However, the formal complaint, did not allege merely that the documents were altered or backdated, or that they were altered "with the intent to mislead the court." Rather, paragraph 21(b) of the Formal Complaint alleges a specific kind of intent to mislead. The specific allegation at issue in this review is that:

> [Respondent] backdated and/or added to notes in his client file to conceal his false statement ["that the representative for the . . . insurance company misrepresented to him the amount of the insurance coverage available in the case"] to the court. [Formal Complaint, ¶21(b); bracketed material quoted from ¶21(a).]

The false statement referenced can only be the one set forth in ¶21(a) of the formal complaint: "that the representative for the defendant's insurance company misrepresented to him [respondent] the amount of the insurance coverage available in the case." However, the Administrator does not seek reversal of the panel's finding that: "someone advised Respondent that there was a Twenty Thousand ($20,000) Dollar minimum policy here and that was all the coverage available." Panel Report, p 5.

Thus, it appears that the Administrator is asking the Board to reverse the panel's finding that respondent altered notes to conceal a false statement to the court -- except that the statement wasn't proven to be false. Under these circumstances, we find no error in the panel's dismissal on the basis that the allegations of the formal complaint were not proven by a preponderance of the evidence.

Moreover, it is not our function to reexamine the evidence *de novo* and substitute our view for that of the panel. Even if the formal complaint contained some form of broader allegation that respondent made the entries in question to mislead the circuit court, our decision would be the same. We are not convinced that the panel's finding to the contrary -- which was made after observing respondent testify -- lacks adequate support in the record. Affirmed.

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

Board Member Nancy A. Wonch was absent and did not participate.