Grievance Administrator,

Attorney Grievance Commission,

Petitioner/Appellant,

v

James J. Rostash, P-19685
Case No. 93-117-GA

Harold Fried, P-13711
Case No. 93-118-GA

Charles J. Golden, P-14101
Case No. 93-119-GA

Respondents/Appellees

Decided: January 19, 1996

BOARD OPINION

The amended complaint charges respondents with conspiring to obtain the recusal of two Monroe Circuit judges and associating as co-counsel to affect the disqualification of these judges in various cases. Numerous bases for misconduct are cited in the amended complaint, but the Grievance Administrator principally relies on the claim that respondents' conduct is prejudicial to the administration of justice. MCR 9.104(1); MRPC 8.4(c); DR 1-102(A)(5). The hearing panel granted respondents' motions for summary disposition under MCR 2.116(C)(8). We affirm.

Petitioner alleged that: (1) former Monroe County Circuit Court Judge James J. Kelley is Respondent Golden's first cousin, and that Judge Kelley "had a reputation . . . for imposing tougher sentences than some of the other judges serving in this court"; (2) Monroe County Circuit Court Judge William F. LaVoy is Respondent Rostash's brother-in-law, and "has had a reputation . . . for imposing tougher sentences than some of the other judges serving in this court"; and (3) Monroe County Circuit Court Judge Daniel L. Sullivan "has had a reputation . . . for imposing more lenient

sentences than any of the other judges serving in this court."

The amended complaint further alleges that respondents conspired to "improperly affect the judicial assignment of [twenty-four] criminal cases in a manner contrary to [MCR 8.111(B) and its predecessors]" by participating "in a scheme to initiate and accept associations as co-counsel by Respondent Golden so as to take advantage of the perpetual disqualification of Hon. James J. Kelley." Similarly, the complaint asserts that respondents conspired to "improperly affect the judicial assignment of [thirty-nine] criminal cases in a manner contrary to MCR 8.111(B)" by participating "in a scheme to initiate and accept associations as co-counsel by Respondent Rostash so as to take advantage of the perpetual disqualification of Hon. William LaVoy." In counts III-V the Grievance Administrator alleges that respondents Golden and Rostash conspired to cause the disqualification of Judge LaVoy in three cases pending in Monroe Circuit Court, and, in the third of these cases, to cause the disqualification of Judge Kelley as well as Judge LaVoy.

In granting the motions for summary disposition under MCR 2.116(C)(8), the panel stated:

> In order for conduct to serve as the basis for an ethical violation, it must be clearly proscribed. [Grievance Administrator v Miles A. Jaffe, 90-154-GA (Bd Op 8/20/93), lv den 445 Mich 1202 (1994).] In that Board decision, it was noted
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> > We believe that a finding of misconduct must be based upon conduct prohibited in the applicable rules, not conduct looked upon with suspicion or disfavor.
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> At the time that the respondents were alleged to have engaged in this conduct, there was no clear proscription against it. In point of fact, it has been argued that the Respondents' conduct is no different than the conduct of other attorneys who associate themselves with other counsel who have a personal relationship with the judge in the hopes that the association will affect the outcome of their case. While the Hearing Panel members look with suspicion and disfavor on the conduct

> alleged by the Grievance Administrator, it is the opinion of the Panel members that said conduct was not clearly a violation of the disciplinary rules as claimed by the Grievance Administrator. [Panel Report, pp 3-4.]

We share the panel's view of this conduct -- and the panel's apparent view that this case presents a close question. And we are mindful of the standard applicable to the panel's decision, and to ours on review. A motion for summary disposition under MCR 2.116(C)(8) may be granted if the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. Simko v Blake, 448 Mich 648; 532 NW2d 842 (1995). All factual allegations contained in the complaint must be accepted as true, together with any legitimate inferences which may be drawn therefrom. Boumelhelm v Bic Corp, 211 Mich App 175, 178; 535 NW2d 574 (1995).

For purposes of determining whether the petitioner's complaint states a claim, we accept, as we must, the truth of the assertion that some or all of these co-counsel associations were entered into for the specific purpose of causing the recusal of Judge Kelley or Judge LaVoy.

This case presents potentially difficult questions as to the specificity with which the ethical constraints applicable to an attorney's conduct must be framed. Of the possible bases of misconduct alleged, we find colorable only the claim that this conduct is "prejudicial to the administration of justice." Many have debated the wisdom of such generality in the formulation of a standard of conduct. However, the standard remains in place in Michigan and in other states which have adopted Rule 8.4(d) of the Model Rules of Professional Conduct.[1] While the rule is designedly a "catchall" provision, this breadth does not allow for the discipline of all types of attorney conduct viewed with suspicion and disfavor. Rather, the better view limits the sweep of this rule to "violations of well understood norms and conventions of practice." 2 Hazard & Hodes, The Law of Lawyering, § 8.4:501, p

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[1]Rule 8.4(c) in the Michigan Rules of Professional Conduct.

957. Also compare In Re Ruffalo, 390 US 546, 556; 88 S Ct 1222, 1229; 20 L Ed 2d 117 (1968) (concurring opinion of Justice White) (discipline should not rest upon a "determination after the fact that conduct is unethical if responsible attorneys would differ in appraising the propriety of that conduct").

At the outset, we note that this case does not present a hint of judicial impropriety. Petitioner does not allege that respondents had a special relationship or arrangement with any judge of the circuit court. Instead, it is claimed that respondents simply perceived that one judge would be "better" for clients with criminal or domestic relations cases.

In our system of jurisprudence a lawyer's traditional, perhaps preeminent, obligation is to represent clients zealously within the bounds of the law. See State Bar v Corace, 390 Mich 419; 213 NW2d 124 (1973) (discussing 1908 Canons of Ethics); DR 7-101. The comment to MRPC 1.3 provides:

> A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.

In countless ways, and on a daily basis, lawyers maneuver about the courts and other dispute resolution systems to achieve what they perceive to be strategic advantages for their clients. Motions for change of venue or to dismiss on grounds of forum non conveniens are but two mechanisms often employed to attain the "best forum," taking into account remedies available, historical jury verdicts, judicial reputations, and many other factors. Once in a particular forum, parties may select counsel based in part on experience presumed to yield "connections" and standing with the judiciary in general or a judge in particular. Doubtless, some parties who consider themselves sophisticated have retained co-counsel, or authorized their lawyer to do so, in the belief that it will stand them in good stead with a certain judge.

Like it or not, the reality is that the assignment of a

particular judge may have an overwhelming if not dispositive impact in many cases. It affects numerous tactical decisions from whether to demand a jury to whether to accept or make a certain offer of settlement. Any appraisal of a lawyer's effectiveness will include his or her ability to advise clients of the practical effect of pursuing a given course of action. Thus, an attempt to separate such considerations from the realm of "legitimate advocacy" are misguided. In fact, two of our Supreme Court Justices appear to have recognized that zealous advocacy may be understood to extend to some form of judge shopping:

> [W]e would grant leave to appeal to consider the effect of the holding in People v Ramsey, 385 Mich 221, 225 (1971), that "as an absolute rule it is reversible error for the trial court sitting without a jury to refer to the transcript of testimony taken at the preliminary examination . . . ." The holding in Ramsey places defense counsel in the position of having to file motions if the possibility of a better forum than the judge they find themselves before exists. Thus, defense counsel is vulnerable whether or not a motion is filed. In our view, sanctions should not be imposed on the basis that a lawyer has filed a frivolous motion when Ramsey itself institutionalizes frivolous motions as a means of forum shopping. [In Re Minock, 441 Mich 881 (1992) (concurrence of Justices Boyle and Riley in summary disposition).]

We understand that every type of conduct giving rise to discipline cannot be anticipated and defined with specificity in a lawyer code. However, we also recognize that these respondents are caught in a clash between the obligation to zealously represent their clients despite personal inconvenience or disagreement with the client's objectives and the obligation to refrain from conduct prejudicial to the administration of justice as that obligation is interpreted by the Grievance Administrator. Many or perhaps most of the finest members of the bar would probably have nothing to do with the relatively blatant conduct alleged in the complaint. But, it is by no means clear that all reasonable practitioners would conclude that such or similar conduct was "prejudicial to the

administration of justice" rather than the aggressive but permissible pursuit of "whatever lawful and ethical measures are required to vindicate a client's cause or endeavor." Comment, MRPC 1.3. Accordingly, we must be cautious not to read a broad rule too broadly and unfairly impose discipline where the conduct could stem from an attempt to comply with another, equally important, duty. As our Supreme Court remarked in another context:

> There are a large number of gray areas in the law. When a question is doubtful, the lawyer's obligation to his client permits him to assert the view of the law most favorable to his client's position. [State Bar v Corace, supra, p 434.]

As members of the public and of the bar, we find it extremely distasteful that a lawyer would trade upon his or her status with respect to a sitting judge under the circumstances alleged here. Perhaps there should be a rule prohibiting a lawyer's acceptance of employment for the sole purpose of disqualifying a judge. However, we do not find that the conduct alleged by petitioner clearly constitutes a violation of a well understood practice norm or convention. Accordingly, we affirm the panel's order of dismissal.

Elaine Fieldman, George E. Bushnell, Jr., Albert L. Holtz, and Marie Farrell-Donaldson, concurring.

Miles A. Hurwitz and Barbara B. Gattorn (dissenting).

Petitioner, Grievance Administrator (herein the "Administrator"), appeals from a grant of summary disposition in favor of respondents pursuant to MCR 2.116(C)(8). The Administrator asserts that the hearing panel improperly granted summary disposition and that its complaint and amended complaint sufficiently alleged a claim upon which relief can be granted.

The Administrator alleged that respondents James J. Rostash, Charles J. Golden and Harold Fried ("respondents") participated in a scheme to counsel their clients, who were parties to litigation in the Monroe County Circuit Court and dissatisfied with the duly

assigned judge in their case, to retain an attorney related to their assigned judge as co-counsel, solely for the purpose of removing the judge from their case. Respondents allegedly received compensation for their ability to accomplish the transfer of a case to the docket of a different judge.

The Administrator argues that such judge shopping activities constitute: (1) a practice prejudicial to the administration of justice; (2) conduct which exposes the courts and the legal system to obloquy, contempt, censure or reproach; and, (3) a violation of various disciplinary rules.

A motion for summary disposition pursuant to MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. Burger v Midland Cogeneration Venture, 202 Mich App 310, 316; 507 NW2d 827 (1993). The factual allegations in the complaint must be accepted as true, together with any inferences which can be drawn from them. The motion should be granted only when a claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. Wade v Dep't of Corrections, 439 Mich 158, 163; 483 NW2d 26 (1992). Beaudin v Michigan Bell Telephone Co, 157 Mich App 185, 187; 403 NW2d 76 (1986).

At least one other jurisdiction has held that a judge shopping/recusal scheme violates an ethical rule against "interfer[ing] with the administration of justice." Standing Committee v Yagman, 55 F 3d 1430, 1436 (CA 9, 1995). In Yagman the disciplinary authority charged that an attorney made certain statements in an effort to cause a federal district judge to recuse himself. Although the Ninth Circuit found Yagman's conduct protected by the First Amendment in that instance, the court expressly held that "[j]udge-shopping doubtless disrupts the proper functioning of the judicial system and may be disciplined." Yagman, 55 F 3d at 1443. We would conclude that the amended complaint states a claim upon which relief can be granted under MCR 9.104(1), MRPC 8.4(c), and DR 1-102(A)(5).

We would also find that petitioner has stated a claim that respondents' conduct exposes the legal profession to obloquy,

contempt, censure, and reproach. MCR 9.104(2). The hearing panel viewed respondents' alleged conduct with suspicion and disfavor. We are convinced that the public would view such conduct as "case fixing" of a sort -- and with some justification. In one of the counts against respondents Rostash and Golden only, it is alleged that an attorney represented a criminal client who initially drew Judge Kelley. Respondent Golden allegedly filed an appearance as co-counsel. It is further claimed that the case was reassigned to Judge LaVoy, at which point respondent Rostash filed an appearance. Finally, according to the complaint, the case went to Judge Sullivan, and the client received probation.

Elementary principles of fairness have led to the adoption of a blind draw system for assigning cases in this state. MCR 8.111(B). Those same principles dictate that the process for assigning cases should not be interfered with absent good reason. These respondents are accused by the Administrator of enabling persons coming before the court to "purchase the assignment of a particular judge to decide issues in [their] case[s]." We agree that such conduct exposes the courts and the legal system to obloquy, contempt, censure, or reproach.

We conclude that the conduct alleged in the complaint would, if proven, be grounds for discipline. Therefore, we would hold that summary disposition pursuant to MCR 2.116(C)(8) should not have been granted.

Board Members John F. Burns, C. Beth DunCombe, and Paul D. Newman did not participate.