Grievance Administrator,

Petitioner/Appellant,

v

Albert Lopatin, P 16794,

Respondent/Cross-Appellant.

92-224-GA

Decided: February 23, 1996

BOARD OPINION

The hearing panel imposed a reprimand based upon its findings that respondent gave things of value to a Michigan Court of Appeals judge under the then-existing provisions of the Code of Professional Responsibility, DR 7-110(A), DR 1-102(A)(1) and MCR 9.104(4); failed to disclose his firm's representation of a judge and/or a member of the judge's family in unrelated proceedings before that judge in violation of MCR 9.104(1) and DR 1-102(A)(5); and engaged in an ex-parte communication with a Court of Appeals judge in violation of MCR 9.104(1-4), DR 102(A)(1),(5) and (6) and DR 7-110(B). The panel specifically found that the evidence did not establish that respondent gave or lent things of value to a judge with intent to influence the judge in his official capacity. Both parties filed petitions for review.

The Grievance Administrator asserts that a reprimand is inappropriate in light of the gravity of the respondent's misconduct. The Grievance Administrator also asserts that the panel erred in granting respondent's motion for summary disposition as to a fourth count which charged that respondent had boasted of his ability to influence judges; the panel erred in certain evidentiary rulings regarding the admissibility of prior consistent statements; and respondent engaged in deceptive practices during

the disciplinary process which should have been considered in aggravation.

Respondent argues that the panel erred in its conclusions that his conduct constituted grounds for discipline; the panel improperly excluded supportive letters from the bench and bar as evidence in mitigation; and the Grievance Administrator's conduct during the proceedings, including the failure to disclose exculpatory material on request, constituted prosecutorial misconduct warranting dismissal of the complaint.

The Attorney Discipline Board has conducted review proceedings in accordance with MCR 9.118 and reviewed the voluminous record below. We hold that 1) the panel's findings and conclusions as to the giving of things of value to a judge are affirmed, limited however to the value of the use of respondent's condominium; 2) respondent's failure to disclose his representation of a judge and/or a member of the judge's family did not constitute professional misconduct and we dismiss Count II; 3) the panel's findings and conclusions as to respondents ex-parte communication with a judge are affirmed; and 4) the panel's decision to impose a reprimand is affirmed.

The other evidentiary and procedural issues raised by both parties have been considered. The Board is not persuaded that the panel erred in its evidentiary rulings or in its decision to dismiss Count IV (Respondent's alleged statements of his ability to influence judges).

On review, the Board must determine whether the panel's findings have proper evidentiary support in the whole record. In re DelRio, 407 Mich 336 (1977); Grievance Administrator v Irving August, 438 Mich 296 (1991). The Board defer to the panel's assessment of credibility. Schwartz v Sauer, DP 25/84, Brd. Opn. p. 359 (1985). Such deference is appropriate in light of a panel's first-hand opportunity to observe and assess the demeanor of the witnesses. In this case, the panel found:

> On those issues in which the hearing panel was presented with sharply conflicting testimony,

> the hearing panel has considered the credibility of the witnesses presented by the Grievance Administrator and the respondent. In those counts in which the Grievance Administrator has failed to carry the burden of proof, the hearing panel has resolved the issues of credibility in favor of the respondent. (Hrg. Pnl. Rpt. p. 8).

Our review of the record persuades us that there is substantial evidentiary support for the hearing panel's findings of fact.

I.

Charges That Respondent Gave Things of Value to Judge Maher

Richard Maher served as a judge in Wayne County and the Michigan Court of Appeals from 1968 until March 1991. Judge Maher and respondent maintained a personal relationship during that period. Until October 1, 1988, respondent's relationship with Judge Maher was governed, in part, by the Michigan Code of Professional Responsibility, DR 7-110(A) which provided:

> A lawyer shall not give or lend anything of value to a judge, official or employee of a tribunal.

While Judge Maher was on the Court of Appeals, respondent: 1) gave Judge Maher numerous tickets to sporting events for the Detroit Pistons, Detroit Tigers and Detroit Red Wings; 2) provided Judge Maher, on approximately eight occasions, the use of condominiums owned by the respondent for which Judge Maher paid the hotel room rate authorized by the State of Michigan for government employees; and 3) permitted Judge Maher, on at least two occasions, to travel on an airplane owned by the respondent's law firm for which Judge Maher reimbursed the law firm at the rate charged to all non-firm passengers.[1]

[1]The panel found that other items of value, such as meals, a sport jacket and money allegedly provided by respondent to Judge Maher were not established by a preponderance of the evidence.

The record establishes that respondent rented his condominium to third parties at a rate of $150 to $200 a day. The record further establishes that when the respondent used the condominium, he reimbursed the respondent at the rate of $40 per day, the standard rate then authorized by the State of Michigan for state employees. We affirm the panel's conclusion that Judge Maher's use of the condominiums on those occasions amounted to a gift from the respondent equal to the amount by which the third party rate exceeded the government rate.

By contrast, we do not agree with the panel's conclusion that the respondent "gave a thing of value" to Judge Maher in connection with the private airplane flights. The evidence established that every non-firm passenger was charged for fuel and pilot time calculated on a chart maintained by the firm's accountant. On two occasions, Judge Maher was a passenger and he paid the firm for those trips at the same rate charged to other non-firm passengers. On those occasions, Judge Maher was not treated differently from third-parties and there is no basis for a finding that the respondent "gave a thing of value" to Judge Maher within the meaning of DR 7-110(A).

Finally, with regard to the tickets to sporting events, both respondent and Judge Maher testified that they exchanged gifts and social favors during the course of a personal friendship of a least 18 years and that they attempted, as best they could, to keep those expenses equal. There is insufficient evidentiary support for a conclusion that the mutual exchange of tickets to sporting events over such a lengthy period constituted gifts in violation of DR 7-110(A).

## II

## Failure to Disclose Representation

With regard to the charge of failing to disclose respondent's representation of Judge Maher and his daughter (Count II), the panel found:

> On or about March 15, 1979, the respondent entered his appearance as substitute counsel for the plaintiff in the case of Richard M. Maher, Individually and as Next Friend to Mary Meagan Maher, a minor v Charles Milsk, Nancy Milsk and Ronald Milsk, Oakland County Circuit Case 78-181314-NI. The panel received unrebutted testimony that Judge Maher's brother, a lawyer, had received a settlement offer of $15,000 when the case was taken over by the Lopatin firm, that the case was settled for $20,000, the Lopatin firm charged a fee of $1,500 for the representation and that an order of dismissal in the case was entered on October 17, 1979. As noted in the previous section, the panel specifically finds that the representation itself was not improper, that the fee charged did not represent a "gift" to Judge Maher and that neither the representation nor the fee charged was intended to influence Judge Maher in his official capacity.

The complaint also alleges that respondent's law firm represented a party in a case decided by the Michigan Court of Appeals on October 1, 1979 (Leyson v Krause, 92 Mich App 759). Judge Maher heard the Leyson case. Respondent admitted that he failed to insure that members of his firm disclose the firm's representation of Richard and Meagan Maher to opposing counsel.

The panel concluded that the failure to disclose this representation did not constitute violations of MCR 9.104(2)-(4); DR 1-201(A)(1) and (6) or DR 7-110(A), but that it was conduct prejudicial to the proper administration of justice in violation of MCR 9.104(1) and Canon 1 of the Code of Professional Responsibility, DR 1-102(A)(5). We reverse.

As the panel noted , an attorney's duty to disclose his or her representation of a judge or a member of a judge's family to opposing counsel is not stated in the current Rules of Professional Conduct (effective October 1, 1988) or in the Code of Professional Responsibility (in effect in 1979). As authority for such a duty, the Grievance Administrator relies on Informal Ethics Opinion CI-1108, a 1985 Ethics Opinion of the State Bar Committee on

Professional and Judicial Ethics and Grievance Administrator v Roger A. Bird, ADB Case No. 92-95-GA (1992).

In Bird, the panel approved a stipulation for consent order of discipline under MCR 9.115(F)(5). The respondent offered a plea of nolo contendere to the charges in exchange for the entry of an order of reprimand. We agree with the panel that there is no indication that the panel in Bird made specific findings on the nature of the respondent's misconduct or that a respondent's plea of no contest has precedential value in other cases.

The State Bar's Committee on Professional and Judicial Ethics, issued informal opinion CI-1108 in 1985, six years after members of respondent's law firm appeared before the Court of Appeals in Leyson v Krause. The ethics opinion itself, as noted by the panel, contains no reference to a specific provision of the Michigan Court Rules or the then-applicable Code of Professional Responsibility, citing only a 1971 ethics opinion of the North Carolina State Bar (North Carolina State Bar, II-226, Opinion 745, April 16, 1971).

Certain relationships between a judge and an attorney automatically constitute grounds for the judge's disqualification. For example, a judge is disqualified by court rule if he or she was a member of a law firm representing a party within the preceding two years [MCR 2.003(B)(4)] or is within the third degree of consanguinity to an attorney in the case [MCR 2.003(B)(5)]. Although MCR 2.003 imposes no absolute duty upon an attorney to disclose such relationships, some attorneys would make opposing counsel aware of the relationship. Similarly, some attorneys would disclose relationships with a judge or a judge's family which would not necessarily require the judge's disqualification. We are not asked to comment, however, on hypothetical situations. Rather, the narrow issue before the Board is whether the failure to disclose, under the facts of this case, constituted professional misconduct warranting discipline.

We conclude that respondent's law firm's representation of Judge Maher's daughter in a relatively simple personal injury action did not constitute a relationship requiring disclosure under

the "well-understood norms and conventions of practice." [2] We note that the hearing panel found no intent to influence Judge Maher and found no showing that Judge Maher would have been required to disqualify himself if respondent's firm had notified opposing counsel.[3] The failure to insure disclose to opposing counsel in Leyson v Krause in 1979 did not constitute conduct prejudicial to the proper administration of justice under then existing provisions of MCR 9.104(1) or DR 1-102(A)(5).

III.

Charges that Respondent Engaged in an Ex-parte Communication with the Court of Appeals

The panel made the following findings of fact with regard to Count III.

> The panel finds, after hearing all testimony, that respondent argued the case of Luszczynski v Henry Ford Hospital, Court of Appeals #84686 in front of Court of Appeals Judge S. Jerome Bronson, Roman Gribbs and Martin Clements. Respondent testified that Judge Bronson, in the interest of expediting oral arguments, asked respondent to brief two new cases which had been decided by the Supreme Court after briefs were filed in the Luszczynski case. Monica Linkner, an attorney in respondent's law firm, prepared a written memorandum addressed to Albert lopatin. In it, she recapped what had occurred at oral argument, and discussed the new Supreme Court cases which respondent had brought to the Court's attention during orals.
>
> * * *

[2]See Hazard & Hodes, The Law of Lawyering, Sec. 8.4:501, p 957.

[3]See Hearing Panel Report, 6/7/95, Footnote 1 page 13. Respondent's law firm represented then-Court of Appeals Judge Dorothy Comstock Riley's husband and son in a personal injury case. In 1973 Judge Riley answered a disqualification motion by declining to disqualify herself for the reason that the Lopatin firm's representation of her husband and son in an unrelated matter had not created any bias or prejudice for or against either party in the case before her.

> Testimony indicates that respondent's memorandum was not properly served on the Court, the other panel judges or opposing counsel. There is no proof of service in the Court file, or in respondent's file, and Judge Gribbs and Judge Clements both testified that they had never received the memorandum.
>
> The panel finds that Mr. Lopatin caused a copy of the memorandum prepared by Linkner to be sent or otherwise communicated to Judge Bronson without proper notice to opposing counsel and the other panel members.

The hearing panel imposed a reprimand, noting that:

> [T]estimony indicates (and is not rebutted) that the memorandum submitted to Judge Bronson discussed the two cases that had been presented on the oral record. Testimony of Linkner, Tr. 1/16/95, p. 1272. (Please note that the transcript of oral argument was not available for hearing as it apparently does not exist.) Respondent testified that he brought new, pertinent Supreme Court cases to the panel's attention at oral argument and presumably in the presence of opposing counsel. Further, the memorandum could not have had an impact on Judges Gribbs and Clements since they had not seen the memorandum and they had taken positions on the case before the memorandum was delivered to Judge Bronson. (Hrg. Rpt. 6/7/95, p. 15)

While the panel properly considered the circumstances surrounding respondent's ex-parte submission in mitigation, those circumstances do not, as respondent argues, constitute a defense to his breach of respondent's obligation to serve a copy of the supplemental brief upon opposing counsel. The court rules and well established practice require that parties be served with all pleadings and briefs. MCR 7.212(A)(1)(b); MCR 7.212(A)(2)(b).

## Level of Discipline

We have modified the panel's findings with regard to the charges that respondent gave things of value to a judge (Count I) and reversed the findings of misconduct regarding respondents

failure to insure disclosure of his firm's representation of a judge to opposing counsel (Count II). For the reasons enumerated by the hearing panel, we agree that a reprimand is appropriate in this case.

To the extent that respondent violated the provisions of DR 7-110(A) by allowing Judge Maher to use a condominium at a reduced rate, we emphasize that DR 7-110(A) has no exact counterpart in the Rules of Professional Conduct which have been in effect in Michigan since October 1, 1988. The current provisions of MRPC 3.5(a) prohibit a lawyer from seeking to influence a judge, juror, prospective juror or other official by means prohibited by law. Former DR 7-110(A), by contrast, prohibited the gift of any item of value by a lawyer to a judge, regardless of any intent to influence or curry favor with the judge and irrespective of any pre-existing family or social relationship. In this case, we affirm the hearing panel's finding of a lack of evidentiary support for the charges that the respondent intended to influence Judge Maher in cases involving (or of interest to) the Lopatin law firm.

With regard to the ex-parte communication, we agree with the panel that the respondent's conduct was not a trivial matter and although no new information was imparted to Judge Bronson, such an occurrence is harmful (or potentially harmful) to the integrity of the judicial process. However, we also share the panel's concern for the remoteness of the incident and the dearth of "hard evidence" in support of this count and we adopt the panel's findings that the misconduct in this case is substantially mitigated by respondent's previously unblemished record over a long and distinguished career; the absence of a finding that he acted out of dishonest or selfish motives and the passage of as much as years between some of the events charged and the filing of the formal complaint. We agree that a reprimand is the maximum discipline which is warranted in this case.

Board Members John F. Burns, C. Beth DunCombe, Marie Farrell-Donaldson, Elaine Fieldman, Barbara B. Gattorn, Albert L. Holtz, Miles A. Hurwitz and Paul D. Newman concur.

Board Member George E. Bushnell, Jr. did not participate.