

Grievance Administrator
Attorney Grievance Commission,

Petitioner/Appellant,

v

Peter E O'Rourke, P 18528

Respondent/Cross-Appellant.

Case No. 93-191-GA

Decided: July 18, 1995

BOARD OPINION

The formal complaint charged that in August 1992, while in a locker room at the Grosse Pointe Yacht Club, the respondent engaged in illegal and improper physical contact with a young man, then age fifteen. The hearing panel concluded that the respondent's conduct violated Michigan Court Rule 9.104(3) which proscribes conduct contrary to "justice, ethics, honesty, or good morals." (emphasis added). Following the separate hearing on discipline required by MCR 9.115(J)(2), the hearing panel entered an order of reprimand.

The Attorney Discipline Board has considered the separate petitions for review filed by the Grievance Administrator and the respondent and has conducted review proceedings in accordance with MCR 9.118, including a thorough review of the evidentiary record before the panel. The Board concludes that the hearing panel's findings and conclusions with regard to the nature of the respondent's misconduct should be affirmed. The Board further finds that the facts and circumstances of this case warrant a suspension of the respondent's license to practice law for a period of 180 days.

I. The Nature of the Misconduct

Although the record in this case is replete with references to the respondent's alleged "criminal conduct", the proceedings were

not instituted with the filing of a judgment of conviction under the procedure described in MCR 9.120(B)(3). By electing to file a complaint under MCR 9.115(B) setting forth the facts of the alleged misconduct, the Grievance Administrator became obligated to prove that the respondent engaged in the physical contact alleged in the complaint and that his conduct violated the following provisions of MCR 9.104 and the Michigan Rules of Professional Conduct (MRPC):¹

- 1) MCR 9.104(2)--conduct that exposes the legal profession or the courts to obloquy, contempt, censure or reproach;
- 2) MCR 9.104(3)--conduct that is contrary to justice, ethics, honesty or good morals;
- 3) MCR 9.104(4)--conduct that violates the standards or rules of professional responsibility adopted by the Supreme Court;
- 4) MCR 9.104(5)--conduct that violates a criminal law of a state or of the United States;
- 5) MRPC 8.4(a)--conduct that violates the Rules of Professional Conduct;
- 6) MRPC 8.4(b)--conduct involving dishonesty, fraud, deceit, misrepresentation or violation of the criminal law where such conduct reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer.

With regard to the alleged violation of MCR 9.104(5), the complaint specifically charged that the respondent's conduct constituted a violation of the Michigan Penal Code, MCL 750.520(e) (criminal sexual conduct in the fourth degree) "or some other lesser included or cognate offense."

Based upon the evidence presented, including the testimony of the respondent and the young man identified by the panel as the "witness" and the expert testimony of a licensed therapist who has engaged in counseling and treatment of the respondent, the hearing

¹ During the hearing, counsel for the Grievance Administrator voluntarily dismissed these charges alleging violations of MCR 9.104(1) and MRPC 8.4(c)--conduct prejudicial to the administration of justice.

panel set forth its reasons for concluding that, although the respondent admitted touching the witness' genitals, the evidence did not establish two necessary elements of MCL 750.520(e): 1) that the touching was accomplished by force or coercion; and, 2) that the touching was done for the purpose of sexual arousal or gratification.

The standard of our review is not the relative weight which we would give to the testimony presented or the conclusions which we would draw from that testimony, but whether there is evidentiary support for the panel's findings and conclusions. Grievance Administrator v August, 438 Mich 296; 475 NW2d 256 (1991). Applying this standard of review, we conclude that the testimony of the witnesses provided proper evidentiary support for the panel's conclusion.

The "witness" testified that he had finished a swimming practice and had changed into a shirt and "loose fitting" baggy pants (Tr. p. 181), when the respondent, who was fully clothed, approached him in the locker room, engaged in conversation and borrowed his hairbrush (Tr. p. 175-178). The witness further testified that, without further warning, the respondent briefly rubbed the witness's stomach before sliding a hand into his trousers and fondling the witness's genitals for about fifteen seconds. (Tr. 156, 181). The witness testified that he was shocked and confused. He stated that the respondent did not physically restrain him or use any other means of threat or coercion (Tr. p. 182). The witness ended the contact by turning and walking past respondent. There was body contact as he pushed past respondent, but respondent did not push back. (Tr. 183).

The Grievance Administrator argues that the hearing panel erred in its reliance upon People v Berlin, 202 Mich App 221 (1993) and People v Patterson, 428 Mich 502 (1987) in reaching its conclusion that the touching in this case was not accomplished by "force" or "coercion" as those terms are used in MCL 750.520(e). Berlin was a physician who had completed an examination of a long-time patient. After a consultation, he took the complainant's hand

and placed it on his crotch, over his trousers and lab coat. She removed her hand. The Court of Appeals ruled that this contact was not accomplished by "force" as that term is used in the statute. Similarly, where a defendant placed his hand on the victim's crotch while she was sleeping, removing it as she turned to switch on a light, the Supreme Court found neither force nor coercion. People v Patterson, supra.

The Grievance Administrator argues that while Berlin and Patterson both involved situations where the actor placed his hands on the outside of victim's clothing, this case is distinguishable because the respondent was required to use some amount of force, no matter how slight, to move his hand inside the victim's trousers. Thus, according to the Administrator, the element of force would not have been present if the respondent had commenced the touching when the witness exited the shower without clothes. This distinction does not take this case out of Berlin and Patterson. Nor, as the Administrator suggests, did the panel improperly consider the element of "surprise" discussed in Berlin. We therefore find that Berlin and Patterson are applicable and that the hearing panel's conclusions regarding the element of force has evidentiary support.

Having affirmed the panel's conclusion that the necessary element of force was not established, we need not address the panel's conclusion that there was insufficient evidence that the touching was done for the purpose of sexual arousal or gratification as required by MCL 750.520(a)(k).

We are not persuaded that the panel erred in its conclusion that there was insufficient force to establish a misdemeanor assault and battery under MCL 750.81; that the panel erred in holding that the "prior bad acts" testimony offered by the petitioner was only marginally relevant; or that the panel erred in not permitting the petitioner to present evidence of the harm suffered by the victim.

The respondent's petition for review includes an allegation that the petitioner engaged in an "overreaching prosecution" and,

specifically, that the petitioner attempted to introduce evidence from the confidential files of the Judicial Tenure Commission without the Tenure Commission authority required by MCR 9.222(E). In this case, questions involving the propriety of any exchange of information between the Judicial Tenure Commission and the Attorney Grievance Commission are neither within the scope of the Board's authority nor necessary for a proper review of the findings of misconduct or the appropriate level of discipline.

We have considered and rejected the respondent's other claims of procedural error. The hearing panel found that the uninvited and non-consensual touching in this case falls within the definition of a "civil battery". Respondent argues persuasively that a civil battery was not charged in the formal complaint nor is it a lesser included or cognate offense of criminal sexual conduct in the fourth degree. However, this does not require reversal of the hearing panel's finding that the respondent's conduct was contrary to "good morals" and therefore violated MCR 9.104(3). The hearing panel's reference to a civil battery as defined in the standard jury instructions² was clearly intended as a further description of the nature of respondent's violation of Rule 9.104(3) and was not intended as a separate violation or grounds for discipline.

II. Level of Discipline

The respondent does not come before the Board on the basis of a criminal conviction nor did the evidence before the panel establish that the respondent engaged in conduct proscribed by the criminal laws of our state. However, conduct which has not been shown to be criminal may nevertheless be described as reprehensible. That is not too harsh a term to describe the respondent's actions in this case. In considering whether a reprimand is an appropriate level of discipline in this case, we are mindful of the Supreme Court's observation in Matter of Grimes, 414 Mich 483; 326 NW2d 380 (1982) that:

² SJI 2nd 115.02

The Rules of Professional Conduct adopted by this Court evidence a commitment to high standards and behavior beyond reproach. We cannot stress too strongly the responsibility of members of the bar to carry out their activities, both public and private, with circumspection. [footnote omitted]

The concept of unprofessional conduct now embraces a broader scope and includes conduct outside the narrow confines of a strictly professional relationship that an attorney has with the court, with another attorney or a client. State v Postorino, 53 WI2d 412, 419; 193 NW2d 1 (1972)

A lawyer is a professional "twenty-four hours a day, not eight hours, five days a week". Id. Matter of Grimes, 326 NW2d 380 at 384.

Respondent admitted that he committed an uninvited, non-consensual touching of the private parts of a fifteen-year old boy in a locker-room at a private club and testified that he had no explanation for that action. His conduct constitutes a sufficient deviation from the "good morals" required by Rule 9.104(3) and, together with his inability to sufficiently explain his actions, constitutes a sufficient violation of Rule 9.104(2) to raise serious questions as to that individual's fitness to be a lawyer.

Irrespective of the absence of the element of force required to establish a violation of MCL 750.052(e), the particular circumstances surrounding the respondent's conduct in this case require a suspension of sufficient length to require an evaluation of the respondent's fitness to practice law in reinstatement proceedings conducted under MCR 9.123(B) and MCR 9.124.

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

Board Member John F Burns was recused.

Board Member George E Bushnell, Jr did not participate.

