STATE OF MICHIGAN

Attorney Discipline Board

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ATTORNEY DISCIPLINE BOARD
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Grievance Administrator,
State of Michigan
Attorney Grievance Commission,

Petitioner/Appellee,

v

Joseph W. Moch, P 23792,

Respondent/Appellant.

ADB 131-88

BOARD OPINION

On December 18, 1990, Ingham County Hearing Panel #3 of the Attorney Discipline Board (Lawrence J. Emery, Esq., Chairman and Leo A. Farhat, Esq. Member)* filed an order of discipline suspending the license of respondent Joseph W. Moch for a period of two years. Both the respondent and the Grievance Administrator have filed petitions for review with the Attorney Discipline Board in accordance with MCR 9.118. In addition, the respondent has filed a separate motion to vacate the hearing panel's order of suspension, to disqualify Ingham County Hearing Panel #3 and to reopen the proofs to allow the respondent to supplement the record with further evidence pertaining to an alleged conflict of interest on the part of hearing panel members Emery and Farhat. An answer to that motion has been filed by the Grievance Administrator and oral arguments were presented to the Board at a hearing on January 30, 1991. For the reasons set forth below, the Board has concludes that while the hearing panel members in this case violated no standards of conduct as lawyers or as quasi-judicial officers, an overriding concern for the protection of the discipline system as well as the rights of the respondent warrants vacation of the hearing panel order of discipline and reassignment of this case to a new hearing panel for trial under the provisions of MCR 9.115.

To understand the nature of the alleged conflict, a brief discussion of the procedural history of this case is required. In March 1988, respondent Moch requested that the Attorney Grievance Commission investigate Grand Rapids attorney Stephen Afendoulis. Mr. Afendoulis was associated in the practice of law with Dennis Kolenda who was then a member of the Attorney Grievance Commission. In August 1988, Mr. Afendoulis and Mr. Moch were notified in a letter from the Attorney Grievance Commission that no evidence of misconduct had been found and that the file was closed. The letter carried a notation, "Kolenda recused". On December 19, 1988, Kent County Circuit Judge Robert A. Benson, the trial judge in the case of Spivey v Javelin, Inc. et al, entered an order impounding the evidence in

that case. The order referred to the filing of one grievance in connection with that case and noted that "it is contemplated that another grievance will also be filed". On January 19, 1989, Mr. Afendoulis initiated the process which resulted in these proceedings by filing a Request for Investigation against Mr. Moch "pursuant to the recommendation of Judge Robert A. Benson. . .". At the time that Request for Investigation was filed, Mr. Kolenda was no longer a member of the Attorney Grievance Commission or Afendoulis' law firm, having resigned both positions to assume the office of Kent County Circuit Judge, effective January 2, 1989.

The Grievance Administrator's complaint against Mr. Moch was filed in August 1989. During the proceedings before the panel, Judge Kolenda testified on behalf of the Attorney Grievance Commission. He testified about an evidentiary hearing in the Spivey case and about the reputations of both Moch and Afendoulis in the legal community.

After Judge Kolenda testified, but before the panel issued its decision on the issue of misconduct, an unrelated legal malpractice case was reassigned from Ingham County to Judge Kolenda in Kent County. Panel member Farhat is a named defendant in the malpractice case and panel member Emery represents a co-defendant. Neither panel member disclosed this development to respondent Moch or the Grievance Administrator. During the pendency of this discipline matter, Judge Kolenda and Judge Benson had confrontations with Moch in connection with yet another unrelated case in Kent County and Moch filed certain pleadings which contained allegations of impropriety involving both judges.

On October 8, 1990, after the panel had announced its decision on the issue of misconduct but before imposing a sanction, Judge Kolenda wrote to the panel members, with copies to the attorneys for the Grievance Administrator and the respondent. His letter referred to respondent's "attacks" on the integrity of the grievance procedure and requested an opportunity to appear before the panel to defend himself and his colleague against Moch's accusations. The letter concluded with the statement that "the integrity of this court must be defended and the allegations [against the court] are matters which I believe should be considered when assessing a penalty on Mr. Moch". A similar letter to the panel was sent by Judge Benson.

It is has not been alleged that either of the hearing panel members responded to the letters from Judge Kolenda or Judge Benson or that there was any communication between the panel members and Judge Kolenda regarding the merits of either the malpractice case pending before him or the discipline case pending before the panel. It would be fair to state, however, that the tone and content of the letters conveyed the judges' feeling that Moch should receive a stiff penalty. Judge Kolenda's letter in particular, coupled with the history of the underlying grievance, could suggest that he had a personal interest in the level of discipline to be imposed.

While we do not find that either panel member was influenced by the judges' letters, it would not be reaching to conclude that a defendant or his counsel might want to please (or at least not displease) the judges who are presiding over the cases in which they are involved. In this case, a judge had expressed, if not directly, then indirectly in what regard panel members could please him. Under these circumstances, we conclude that there is an appearance of impropriety (regardless of actual bias) for Mr. Farhat and Mr. Emery to continue as panel members in this case.

In considering the issue of the hearing panel's disqualification in this case, the Board recognizes that mere questions of the impartiality of a hearing panel threaten the purity of the discipline process, just as any question of a judge's impartiality threatens the purity of the judicial process and its institutions. Potashnick v Port City Construction Company, 609 F 2d 1101, 1111 (5th Cir, 1980). Our Supreme Court, in Glass v State Highway Commissioner, 370 Mich 483 (1963) has ruled that disqualification may be appropriate even where actual prejudice or bias has not been established, citing In re Murchison, 349 US 133, 75 S Ct 623, 99 L Ed 942:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'every procedure which would offer a possible temptation to the average man as a judge. . .not to hold the balance nice, clear and true between the state and the accused denies the latter due process of law'. . .Such a stringent rule may sometimes bar trial by judges who have no actual bias and would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice'. Offutt v United States, 348 US 11, 14, 75 S Ct 11, 99 L Ed 11."

There should be no question that the Board's decision in this case is not based on a finding that Judge Kolenda or the members of the Ingham County Hearing Panel engaged in acts of judicial or professional misconduct. By the same token, let there be no mistake that the Board is prepared to take extraordinary steps, when appropriate, to insure confidence in the discipline process.

Circumstances in this case have created a situation in which the issues of disqualification, disclosure and due process have become inextricably intertwined with the fundamental issue in this, or any discipline case--whether a licensed attorney has committed acts of

professional misconduct in violation of the standards promulgated by the Supreme Court.

To fulfill its obligations to do justice and to satisfy the appearance of justice, the Board has therefore concluded that this case must be reassigned to a new hearing panel for further proceedings. The complaint filed by the Grievance Administrator and the answer filed on behalf of the respondent shall constitute the record at the time of reassignment and the further proceedings before the new panel will be governed by the applicable provisions of MCR 9.115.

Concurring: Remona A. Green, Hanley M. Gurwin, Linda S. Hotchkiss, M.D., and Theodore P. Zegouras.

George E. Bushnell and John F. Burns did not sit with the Board for the argument of this case and took no part in its deliberation or decision.

CONCURRING OPINION

Elaine Fieldman

I agree with the decision to remand this matter for a new hearing before a different panel because Leo Farhat's participation in this matter after March, 1990 created a question concerning "the appearance of impropriety." Because the decision to remand is appropriate based on Farhat's involvement alone, it is not necessary to decide whether Lawrence Emery's participation created the same question concerning the appearance of impropriety.

Lawyers routinely appear before judges and represent many litigants--that is a major part of the business in which we are involved. However, lawyers are not routinely named as defendants in lawsuits. The parties have far larger stakes in litigation and hence a far greater interest in the outcome of litigation, than do the lawyers. The client's interest is personal, while the lawyers interest is professional. To be sure, a lawyer wants his clients to prevail in litigation, and should vigorously represent his clients. However, when the case has reached its conclusion, it is the client who lives with the judgment for the rest of his life--the lawyers goes on to the next case.

While one could argue that a lawyer may want to please a judge when he has a case pending before the judge, the same could be said about a lawyer who does not currently have a case pending before the judge, but regularly practices in the circuit and thus would likely have future cases assigned to the judge. Taking it one step further, one could argue that lawyers typically want to please judges and thus lawyers should never be in decision-making roles when judges are called as witnesses. I am not prepared to make such a suggestion and it is not necessary that we take the first step toward that conclusion in this case.

Because it is not necessary to reach the question of whether Emery's participation created the appearance of impropriety, the Board should exercise restraint before traveling down a road that could lead to illogical, impractical and perhaps unfair results.

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Grievance Administrator,
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Joseph W. Moch, P 23792,

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AMENDED CONCURRING OPINION

Elaine Fieldman

I agree with the decision to remand this matter for a new hearing before a different panel because Leo Farhat's participation in this matter after March, 1990 created a question concerning "the appearance of impropriety." Because the decision to remand is appropriate based on Farhat's involvement alone, it is not necessary to decide whether Lawrence Emery's participation created the same question concerning the appearance of impropriety.

Lawyers routinely appear before judges and represent many litigants--that is a major part of the business in which we are involved. However, lawyers are not routinely named as defendants in lawsuits. The parties have far larger stakes in litigation and hence a far greater interest in the outcome of litigation, than do the lawyers. The client's interest is personal, while the lawyers interest is professional. To be sure, a lawyer wants his clients to prevail in litigation, and should vigorously represent his clients. However, when the case has reached its conclusion, it is the client who lives with the judgment for the rest of his life--the lawyer goes on to the next case.

While one could argue that a lawyer may want to please a judge when he has a case pending before the judge, the same could be said about a lawyer who does not currently have a case pending before the judge, but regularly practices in the circuit and thus would likely have future cases assigned to the judge. Similarly, a lawyer who does not have a litigation practice may have colleagues who have cases pending before the judge or who regularly practice in the circuit. Taking it one step further, one could argue that lawyers typically want to please judges and thus lawyers should never be in decision-making roles when judges are called as witnesses or express an interest in the outcome of a discipline matter. This would disqualify virtually all panel members in such circumstances. I am not prepared to make such a suggestion and it is not necessary that we take the first step toward that conclusion in this case.

Because it is not necessary to reach the question of whether Emery's participation created the appearance of impropriety, the Board should exercise restraint before traveling down a road that could lead to illogical and perhaps unfair results.