State of Michigan
Attorney Grievance Commission

Petitioner/Cross-Appellant,

v

James A Tucker, P 21608,

Respondent/Appellant.

94-12-GA

Decided: May 23, 1995

BOARD OPINION

Respondent was charged with neglecting a criminal matter entrusted to him by his client and with making misrepresentations to the client and to a federal judge. The panel entered an order suspending respondent's license for 240 days, noting in its report that respondent had a record of prior discipline "showing a similar propensity for false representations." Respondent has petitioned for review, arguing that the panel's finding of misconduct is not supported by the evidence. Respondent also raises certain constitutional arguments. The Grievance Administrator has petitioned for review and argues that respondent's license should be revoked. For the reasons stated below, we affirm the hearing panel order of suspension.

Respondent first argues that (1) these proceedings are unconstitutional "because they provide no right to judicial review," and (2) that certain provisions of the Michigan Rules of Professional Conduct and of subchapter 9.100 of the Michigan Court Rules are overbroad and void for vagueness. Respondent also argues that the Board lacks authority to decide these questions because the "Michigan attorney discipline process is not judicial."

Due process is not necessarily judicial process. Sessions v

Connecticut, 283 F Supp 834 (D Conn, 1968), aff'd 404 F2d 342 (CA 2, 1968); Reetz v Michigan, 188 U S 505; 23 S Ct 390; 47 L Ed 563 (1902). It is well established that the elements of due process, such as notice, and an opportunity to be heard before an impartial tribunal, may be afforded by a board, commission, administrative officer or even a private body. 16A Am Jur 2d, Constitutional Law, § 854, pp 1072-1073. This Board and its hearing panels can hear and resolve ordinary discipline matters which require the decision-maker to apply the Michigan Rules of Professional Conduct to a given set of facts.

Because it is a judicially created agency, this Board has no common law or inherent powers. Rather, the Board has only those powers granted by the Michigan Supreme Court under subchapter 9.100 of the Michigan Court Rules or by such other rules the Court may adopt to carry out its exclusive constitutional responsibility to supervise and discipline Michigan attorneys.

As the adjudicative arm of the Michigan Supreme Court for attorney discipline matters this Board is not infrequently faced with claims that a respondent's constitutional rights have been or will be jeopardized in the course of disciplinary proceedings. While recognizing its limited grant of authority, the Board has considered such claims and has applied constitutional precedents in the context of the discipline matters before it. See, e.g., Grievance Administrator v Robert J Buk, 35947-A, (Brd. Opn. 12/12/79) (applying Bates v State Bar of Arizona, 433 U S 350 [1977] and holding that DR 2-103(A) did not violate the First Amendment or the Due Process Clause); Grievance Administrator v Peter R Barbara, DP 62/86 (Brd. Opn. 2/8/88) (addressing indigent incarcerated respondent's due process claim for appointed counsel and psychiatric expert); Grievance Administrator v James N Canham, DP 223/86 (Brd. Opn. 7/28/87) (applying In Re Ruffalo, 390 U S 544 [1968], and Grievance Administrator v Freid, 388 Mich 711 [1972], due process cases which require that a finding of misconduct must be preceded by fair notice to the respondent); Grievance Administrator v Kenneth E. Scott, DP 189/86 (Brd. Opn. 2/22/89)

(same; reversing finding of misconduct on due process grounds); Grievance Administrator v Leonard R Eston, DP 75/85, (Brd. Opn. 7/7/87) (rejecting respondent's claim that he was denied Fifth Amendment right against self-incrimination and Miranda rights).

It is true that administrative tribunals generally do not decide constitutional questions. See, e.g., Wikman v Novi, 413 Mich 617, 646-647; 322 NW2d 103 (1982) (executive branch agency); Universal Am-Can v Attorney General, 197 Mich App 34, 37-38; 494 NW2d 787 (1992), lv den 443 Mich 861 (1993) (agency may resolve issues couched in constitutional terms that do not involve validity of statute). However, it is not unthinkable that an "Ethics Committee, the majority of whom are lawyers," may consider "a claim that the [disciplinary] rules which they were enforcing violated federal constitutional guarantees." Middlesex County Ethics Committee v Garden State Bar Association, 457 U S 423, 435; 102 S Ct 2515; 73 L Ed 2d 116, 126 (1982).

Of course, the Michigan Supreme Court may make any order it deems appropriate on appeal from a decision of this Board. MCR 9.122(E). And, we possess no declaratory or injunctive powers. However, we will consider respondent's constitutional claims to the extent that he relies on them in requesting reversal of the hearing panel's order of discipline and dismissal of these proceedings.

Respondent's assertion that this state's disciplinary system violates the due process clause because it "provide[s] no right to judicial review," is not supported by apt authorities, and lacks merit for several reasons. First, even if subchapter 9.100 of the Michigan Court Rules made no provision for review of decisions by the hearing panels and this Board, and even if we assume that administrative law principles are applicable in this context, the disciplinary system would not be rendered unconstitutional:

> A statute conferring power upon an administrative agency is not unconstitutional as violating due process of law merely because it does not expressly provide for judicial review of an administrative determination. This rule rests, at least in part, upon the principle that the right of judicial review

> with respect to certain kinds of issues is always implied, the court sometimes expressly stating that this right of review is guaranteed by a constitutional command.

2 Am Jur 2d, Administrative Law, § 423, pp 419-420 (footnotes omitted).

Further, the Michigan Supreme Court has provided for review of the Board's decisions. A party aggrieved by the Board's decision may apply for leave to appeal to the Supreme Court. MCR 9.122(A); MCR 7.302. Such a party may present extensive briefing to the Supreme Court. MCR 7.301. The Court may grant leave, or the Court may correct any errors below by means of an order. MCR 7.316(A)(7). As with all appeals to the Supreme Court, if leave is granted, the Court may grant or dispense with oral argument. MCR 7.312(B)(2). Also, disciplinary proceedings are subject to the superintending control of the Supreme Court. MCR 9.107. A respondent may commence original proceedings in the Supreme Court (Complaint for Mandamus) to implement the Court's superintending control power when an application for leave to appeal cannot be filed. MCR 7.304(A).

In <u>Dohany v Rogers</u>, 281 US 362, 368; 50 S Ct 299, 302; 74 L Ed 904 (1930), the United States Supreme Court explained that:

> [t]he due process clause does not guarantee to the citizen of a state any particular form or method of state procedure. Under it he may neither claim a right to trial by jury nor a right of appeal. Its requirements are satisfied if he has reasonable notice and reasonable opportunity to be heard and to present his claim or defense; due regard being had to the nature of the proceeding and the character of the rights which may be affected by it.

See also, <u>Billotti v Legursky</u>, 975 F2d 113, 115-117 (CA 4, 1992), cert den ___ US ___; 113 S Ct 1578; 123 L Ed 2d 146 (1993) (holding that discretionary review of a criminal conviction does not violate due process).

Respondent has failed to explain what form of appellate

procedure he would consider constitutionally sufficient; he merely asserts that he is entitled to review as of right. However, the form of an appeal of right is not immutable or constitutionally guaranteed. For example, even in such an appeal, there is no "right" to oral argument. See Fed R App P 34(a); 6th Cir R 9. See also MCR 7.214(E). And the Fourteenth Amendment's Due Process Clause does not require an opinion to address all arguments raised by a party, nor does it prescribe any particular form of opinion-writing. Clark v Clark, 984 F2d 272 (CA 8, 1993), cert den ___ U S ___; 114 S Ct 93; 126 L Ed 60 (1993). Indeed, a court may decide an appeal of right in an order. See, e.g., 6th Cir R 19; MCR 7.214(E). We cannot conclude that the procedures set forth in the Michigan Court Rules for review of this Board's decisions, or for presentation of constitutional or other questions directly to the Michigan Supreme Court, violate the Due Process Clause.

Respondent's challenges to subchapter 9.100 and the Michigan Rules of Professional Conduct on grounds of overbreadth and vagueness lack merit. Respondent was afforded sufficient notice that neglect and misrepresentation may give rise to charges of professional misconduct.

The charges of misconduct in this case arise out of respondent's representation of George Forth commencing early in 1991. At that time, Forth retained respondent to represent him in anticipated criminal proceedings. Forth, while an employee at an automobile dealership, participated in a scheme with the proprietors of the dealership to defraud various lenders by using loan applications from fictitious borrowers supported by non-existent collateral. The hearing took place over four days, and testimony was taken from the Assistant U S Attorney in charge of Forth's case, the FBI agent assigned to the case, respondent, and respondent's successor counsel. The de bene esse deposition of George Forth was taken and read into the record.

Respondent and Forth met with Assistant U S Attorney Haviland and an FBI agent in May 1991. Haviland wrote to respondent on January 8, 1992 enclosing a proposed plea agreement. Similar

agreements and letters were sent to respondent in August and December 1992, but those contained an offer to recommend a minimum sentence of twenty-four months (six months less than the January 8th proposal). It is undisputed that respondent failed to answer Haviland's letters within the deadlines they contained--even though respondent was aware that the government's offers were based upon Forth's cooperation in the prosecution of his co-defendants. Haviland testified that respondent was made aware that the plea offer would be withdrawn if the co-defendants struck a deal with the government first.

Haviland testified that he had placed numerous phone calls to respondent and that respondent failed to return the calls. He further testified that he had only two telephone conversations with respondent, one on February 24, 1992, and another on August 31, 1992. Both phone calls were in response to Haviland's letters and both took place after the offers therein had expired. According to Haviland, respondent indicated both times that he was about to discuss the offer with his client; the offers were not rejected in those telephone contacts nor were any offers rejected in writing or otherwise.

The record establishes that on or about February 16, 1993, Haviland filed with the federal district court in Flint a petition for hearing to determine representation of defendant. The petition recites the foregoing facts, and states that Forth twice contacted the FBI expressing a willingness to plead guilty. In response, the respondent filed his own affidavit stating that he represented Forth, that he had discussed "both of the government's offers" with Forth, and that Forth had refused to accept them. (Respondent testified that although there were three separate proposals, he viewed them as constituting only two offers because the August and December proposals were identical.)

Forth retained a new attorney in March 1993. An evidentiary hearing was held on the issue of respondent's alleged ineffective assistance of counsel. Both respondent and Forth testified at the hearing. Among other things, respondent testified that he had

communicated his client's rejection of the August 1992 plea offer to the U S Attorney. Forth, on the other hand, testified that respondent had never made him aware of the August 1992 plea offer. Forth also testified similarly in these proceedings. The record includes a letter from respondent's office to Forth enclosing the December plea offer; the postmark and date indicate that the proposed plea agreement was not mailed to Forth until the day of its expiration.

We review the findings of the hearing panel for proper evidentiary support in the whole record. Grievance Administrator v August, 438 Mich 296, 304; 475 NW2d 256 (1991). Applying this standard, we conclude there clearly is proper evidentiary support for the panel's finding that respondent failed to timely communicate to his client all plea offers made by the government, and failed to keep Mr Forth reasonably advised of the status of his matter, contrary to MRPC 1.1(c), 1.3, 1.4, and 3.2.

We also conclude that there is proper evidentiary support for the finding that respondent's affidavit was knowingly false. The affidavit states that "[d]efendant has refused to accept either of the government's offers." The evidence indicated that Forth met with respondent in March 1992 and signed the plea agreement which had expired in January. Respondent testified that the signature was obtained only so that he would have it in case Forth later proved difficult to reach. Respondent further testified that Forth was thereafter holding out for a better deal. However, even if we assume that Forth rejected the March 1992 proposed agreement, there is ample evidence to sustain a finding that Forth rejected neither the August nor the December 1992 plea agreement. Forth consistently testified that he was not aware of the August agreement; Forth also testified that he signed and returned the December agreement.

Finally, there is sufficient evidence to sustain the panel's finding that respondent testified falsely at the hearing on ineffective assistance of counsel when he stated that he had advised the U S Attorney's Office that Forth rejected the plea

agreement imposing a minimum sentence of twenty-four months. The panel properly determined that respondent's misrepresentations to the court were in violation of MRPC 3.3(a)(1).

The Grievance Administrator has also petitioned for review, arguing that the panel's order suspending respondent for 240 days is insufficient. In Grievance Administrator v Ann Beisch, DP 122/85 (Brd. Opn. 2/8/88), we held that the attorney's misrepresentations to her client required a suspension of sufficient length so as to require the respondent to demonstrate her fitness in reinstatement proceedings under MCR 9.123(B) and MCR 9.124. The discipline imposed by the panel in this case will require reinstatement proceedings. After a careful review of the whole record, we conclude that it is sufficient to protect the public, the courts and the legal profession.

John F. Burns, C. Beth DunCombe, Elaine Fieldman, Barbara B. Gattorn, Albert L. Holtz and Miles A. Hurwitz.

Board Members George E. Bushnell, Jr., Marie Farrell-Donaldson and Paul D. Newman were absent and did not participate.