Grievance Administrator,
State of Michigan
Attorney Grievance Commission,

Petitioner,

v

George Ashford, P 28317

Respondent.

Case No. 92-175-GA

Decided: February 16, 1995

BOARD OPINION

On December 6, 1993, Tri-County Hearing Panel #27 of the Attorney Discipline Board filed an Order of Reprimand With Conditions in this matter. In accordance with MCR 9.115(J)(1), the panel's order was accompanied by its report setting forth its unanimous conclusion that respondent had engaged in professional misconduct in violation of MCR 104(1-4) and the Michigan Rules of Professional Conduct 4.2 and 8.4(a,c). The panel further reported that, based upon the evidence submitted at a separate hearing on discipline pursuant to MCR 9.115(J)(2), the respondent should be reprimanded with conditions in the nature of oversight of certain aspects of the respondent's professional and personal conduct for a period of two years.

The Grievance Administrator filed a petition for review seeking reversal of the panel's order of reprimand with conditions. The Grievance Administrator requests an order suspending the respondent's license to practice law. The respondent filed a cross-petition for review seeking reversal of the panel's findings of misconduct.

The hearing panel's report includes a summary of the

allegations in the formal complaint that, in his representation of Northwest Airlines in a wrongful discharge action entitled Tony Cottman et al v Northwest Airlines, U S District Court, Eastern District of Michigan, Southern Division, 89 CV 72545-DT and 89 CV 7290-DT, and while the matter was pending, respondent engaged in an intimate personal relationship with Debra Brown, a plaintiff in that litigation. The complaint further charged that the respondent engaged in communications with Ms Brown concerning the litigation without the permission of her counsel, that he made ex-parte settlement offers to Ms Brown and that he advised her not to influence the other plaintiffs in the litigation. In its report on misconduct, the hearing panel found in the Grievance Administrator's favor as to these allegations.

On review, the factual findings of a hearing panel are to be reviewed by the Attorney Discipline Board for proper evidentiary support in the whole record. Grievance Administrator v August, 438 Mich 296; 475 NW2d 256 (1991). Based upon its review of the whole record, the Board concludes that there is proper evidentiary support for the hearing panel's conclusion that the respondent violated MCR 9.104(1-4) and the Michigan Rules of Professional Conduct 4.2 and 8.4(a,c).

While the Board reviews the panel's findings for proper evidentiary support, it possesses at the same time a greater measure of discretion with regard to the ultimate decision, in this case, the appropriate level of discipline. August, supra at 304; In Re Daggs, 411 Mich 304, 318-319; 307 NW2d 66 (1981). The Grievance Administrator's request for increased discipline is founded, in large part, upon the argument that the respondent engaged in "a pattern of intentional and deliberate acts of misconduct" (Grievance Administrator's Brief in Support of Petition for Review, p 28). Such a characterization does not appear in the hearing panel's reports nor does the panel's report contain specific findings with regard to issues upon which it received conflicting

or contradictory testimony. In reviewing the discipline imposed by the panel, the Board must therefore consider the panel's statements in the record that the respondent's actions were not willful or deliberate and that the respondent did not act with intent to undermine the legal system. (Hrg 9/23/93, Tr p 217).

There is ample evidentiary support for the panel's expressed and implied findings that the respondent's actions violated the rules charged in the complaint but were not the result of a calculated scheme to influence that litigation. Such factors include respondent's corroborated testimony that he asked another attorney in his firm to handle those aspects of the case involving Ms Brown when he recognized her as someone he had met socially some time before; testimony regarding the number of occasions on which his social relationship with Ms Brown was conducted in public and in the presence of Ms Brown's attorney and the sharply conflicting testimony regarding the precise nature of that relationship and the substance of respondent's conversations with Ms Brown. While more detailed findings on these issues might have been helpful, the circumstances of the case and the nature of the charges in the complaint did not require resolution of each and every factual dispute in order to conclude that the misconduct outlined in the complaint had been established.

In this case, the absence of a dishonest or selfish motive could be considered as a mitigating factor, [ABA Standards for Imposing Lawyer Sanctions, 9.32(b)]. as could the absence of a prior disciplinary record [ABA Standard 9.32(a)] and the testimony of friends and colleagues as to respondent's character and reputation [ABA Standard 9.32(g)].

Finally, we have considered the weight which the panel assigned to the evidence of respondent's impaired ability at the time of his misconduct. In its report on discipline, the panel stated:

> "Of particular import pursuant to Michigan Court Rule 9.121 was testimony of Douglas MacDonald, MD. Dr MacDonald opined that during the period which was the subject of the complaint at issue, Mr Ashford's ability to practice law competently was materially impaired by the alcohol addiction. Further, it was evident that this impairment was the cause of or substantially contributed to the conduct at issue. Further, it is evident that the cause of the impairment is and has been susceptible to treatment. Testimony clearly indicated that Mr Ashford has in good faith undergone treatment and will continue to undergo treatment in the future."

Based upon our review of the record, we conclude that the hearing panel's decision has evidentiary support and is consistent with the goals of these discipline proceedings. Therefore we affirm the panel's decision to reprimand the respondent with conditions imposed in accordance with MCR 9.106(3) that for a period of two years, the managing partner of the respondent's law firm shall provide quarterly reports to the Attorney Discipline Board and the Grievance Administrator which shall include a description of respondent's duties at the firm, a report on his competency and verification of his abstinence from alcohol or chemical substances.

Board Members John F Burns, George E Bushnell, Jr, Marie Farrell Donaldson and Barbara B Gattorn concur in this opinion.

Board Members C Beth DunCombe*, Albert L Holtz, Linda S Hotchkiss, M.D.* and Miles A Hurwitz* did not participate.

*Voluntarily Recused.

OPINION CONCURRING IN PART AND DISSENTING IN PART

Elaine Fieldman

The Grievance Administrator charged that Respondent's alleged conduct violated MCR 9.104(1)-(4) and MRPC 4.2 and 8.4(a)and(c). Without making specific findings of fact, the hearing panel found in favor of the Grievance Administrator with respect to the alleged rule violations.

The Formal Complaint alleges:

> i) While a case was pending, Respondent engaged in an intimate personal relationship with an adverse party;
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> ii) Between March, 1990 and November, 1991, Respondent engaged in ex parte communications with the adverse party concerning the litigation;
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> iii) Between March, 1990 and November, 1991, Respondent made ex parte settlement offers to the adverse party; and,
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> iv) Between March, 1990 and November, 1991, Respondent advised the adverse party "not to influence the other plaintiffs" in the litigation.

Complaint, Paragraph 3(D).

The complaint does not describe the "intimate personal relationship." At the hearing, the Grievance Administrator maintained that Respondent and the adverse party had danced at a bar and had several sexual encounters. While having a relationship with an adverse party is poor judgment and may lead to violations of the discipline rules, in and of itself, such a relationship is not a per se violation of the rules.[1]

[1] During oral argument, counsel for the Grievance Administrator argued that sexual relationships inevitably lead to "pillow talk" and would give the lawyer an unfair advantage because he would know more about the opposing party and thus such

It is a very close question as to whether there is sufficient evidence that Respondent violated MCR 9.104(1) and MRPC 8.4(c). Because I agree that the discipline imposed was appropriate regardless of whether MRPC 8.4(c) was arguably violated, I would not reach that issue in this case.

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relationships are per se misconduct. Respondent denied that he had a sexual relationship with the adverse party. The panel did not find that Respondent had a sexual relationship with adverse party. There was no evidence that the alleged sexual contacts were not consensual, led to "pillow talk" or that Respondent gained information as a result. In any event, there is no requirement that a lawyer must be a stranger to an opposing party. There are many situations where a lawyer could have information about an adverse party. For example, the lawyer could have been a former spouse, lover or friend of the adverse party or could know friends or family of the adverse party. Knowing an opposing party is not a basis for disqualification.