STATE OF MICHIGAN
ATTORNEY DISCIPLINE BOARD

Grievance Administrator, State of Michigan Attorney Grievance Commission,

Petitioner,

v

Jay A. Bielfield, P-10788,

Respondent.
_____/

DECIDED: August 30, 1993

Case No. ADB 87-88

Grievance Administrator, State of Michigan Attorney Grievance Commission,

Petitioner,

v

Albert Lopatin, P-16794,

Respondent.
_____/

Case No. 92-224-GA

Grievance Administrator, State of Michigan Attorney Grievance Commission,

Petitioner,

v

Ricardo Lubienski, P-16833,

Respondent.
_____/

Case No. 92-157-GA

Grievance Administrator, State of Michigan Attorney Grievance Commission,

Petitioner,

v

Richard M. Maher, P-16985,

Respondent.
_____/

Case No. 92-225-GA

OPINION

We granted interlocutory review in these four cases to decide whether the Grievance Administrator may be required to disclose potentially exculpatory information to respondents if he does not intend to introduce the information at a hearing. The parties agree that we have the power and authority under MCR 9.110 to rule on the issues presented.

After the formal complaints were filed, respondents in each of the cases asked the Grievance Administrator to provide potentially exculpatory information obtained during his investigation. The Grievance Administrator refused to provide the information, relying on MCR 9.115(F)(4). The hearing panels issued different rulings on respondents' motions for production.[1]

MCR 9.115(F)(4) provides in relevant part:

> Discovery. Pretrial or discovery proceedings are not permitted, except as follows:
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> > (a) Within 21 days of the service of a formal complaint, a party may demand in writing that documentary evidence that is to be introduced at the hearing by the opposing party be made available for inspection or copying. * * *
> >
> > (b) Within 21 days of the service of a formal complaint, a party may demand in writing that the opposing party supply written notification of the name and address of any person to be called as a witness. * * *
> >
> > (c) A deposition may be taken of a witness living outside the state or physically unable to attend the hearing.
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> > (d) The hearing panel may order a prehearing conference held before a panel member to obtain admissions or otherwise narrow the issues presented by the pleadings.

In his brief and during oral argument, the Grievance Administrator asserted that MCR 9.115(F)(4) requires that he withhold exculpatory information from everyone except the Attorney

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[1] Attached as Appendix A is a summary of what each respondent requested and how each panel ruled. The Grievance Administrator stated that an order requiring production of exculpatory information is an order requiring production of all of the requested information. Transcript of oral argument at 198. Thus, if we order the Grievance Administrator to disclose "exculpatory information," according to him, he would be required to disclose all of the requested information. Throughout this opinion we will use the term "exculpatory information" in the generic sense to mean all of the requested information.

Grievance Commission unless he intends to introduce the information at a hearing. The Grievance Administrator further insists that it would be a violation of the rules if he were to disclose such information to respondents. For example, see transcript of oral argument at 49-51.

Respondents argue that the rule does not prohibit disclosure of the requested information and the rule, as interpreted by the Grievance Administrator, is unconstitutional and violates notions of fundamental fairness.[2]

We conclude that the Supreme Court did not intend in MCR 9.115(F)(4) to prohibit the disclosure of exculpatory information to respondents and that the Grievance Administrator's position, if adopted, would be fundamentally unfair. We order the Grievance Administrator to disclose the following to respondents:

> 1) Written or recorded statements and notes relating to interviews of respondents and other persons except notes of mental impressions of the attorneys for the Grievance Administrator or Grievance Commission.
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> 2) Investigative reports and memoranda.
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> 3) Identification of all persons interviewed in connection with the investigation.
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> 4) Consideration or inducements, given or offered, or threats made or suggested by any person acting on behalf of the Grievance Administrator or Grievance Commission to any person interviewed in connection with the investigation and the criminal record of each such person.
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> 5) All tangible objects obtained during the investigation including audio and video tapes and photographs.
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> 6) All exculpatory information and material.[3]

I.

The field of attorney discipline is fast becoming (or has become) a specialized area of practice. For many years, the vast majority of cases coming before the Board involved primarily the

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[2]The respondents have not made identical arguments. We merely summarize the arguments as a group in this opinion.

[3]According to the Grievance Administrator, all of the requested information comes within the request for exculpatory information. See n 1, supra. However, so there is no question, we order the Grievance Administrator to disclose all requested information.

question of the appropriate amount of discipline. Recently, cases have presented more legal and technical issues and are more complicated and sophisticated. Respondents are more frequently represented by lawyers who specialize in the area of attorney ethics and discipline. It appears that this dispute has developed, at least in part, because the office of the Grievance Administrator has expanded its investigations to more routinely include subpoenaing of witnesses and the taking of witness statements.

The parties agree that if these were civil or criminal cases, respondents would be entitled to the requested information. However, attorney discipline matters are neither civil nor criminal cases; they are similar and dissimilar to both. For example, attorneys charged with misconduct are not entitled to jury trials -- a right given to all civil and criminal trial litigants in the state courts. The burden of proof in attorney discipline cases is preponderance of the evidence, the same standard as in civil cases. MCR 9.115(J)(4). Respondents do not face imprisonment or fines as do defendants in criminal cases. Respondents can be called as witnesses, but cannot be compelled to incriminate themselves. And, the refusal to answer questions on Fifth Amendment grounds cannot be used against a respondent. State Bar v Woll, 387 Mich 154 (1972).

The court rules provide that the general civil rules for non jury cases apply to attorney discipline matters except where the specific discipline rules differ. MCR 9.115(A). Yet, case law describes attorney discipline cases as "quasi criminal" and disbarment as "highly penal." State Bar v Woll, supra at 161, 164; Matter of Baluss, 28 Mich 507, 508 (1874).

During oral argument, there was a lengthy discussion of whether disclosure of the requested information would be a "discovery proceeding" under the rule. Respondents refer to MCR 6.001 by analogy, which prohibits "discovery proceedings" in criminal cases.[4] The parties agree that notwithstanding the prohibition of "discovery proceedings" in MCR 6.001, a criminal prosecutor would be required to disclose the requested information. The Grievance Administrator attempted to distinguish MCR 6.001, stating that that rule only prohibits discovery proceedings under MCR subchapter 2.300 and that the requests in this case would not fall within MCR 2.300. Thus he argued, while the requested information would not be excluded under MCR 6.001, it must be excluded under MCR 9.115(F)(4). We disagree. If this were a civil case, the requests could be requests for production of documents

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[4]MCR 6.001(D) provides in relevant part:

> The provisions of the rules of civil procedure apply to cases governed by this chapter, except ***
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> > Depositions and other discovery proceedings under subchapter 2.300 may not be taken for the purposes of discovery in cases governed by this chapter.

and things under MCR 2.310. The comparison to MCR 6.001 is therefore legitimate and the requested information could be outside MCR 9.115(F)(4) as it is outside MCR 6.001.

We agree with the Grievance Administrator that the rules governing attorney discipline are designed to accomplish a prompt resolution. Indeed, the rules provide that the "[p]rocedures must be as expeditious as possible." MCR 9.102(A).

In adopting MCR 9.115(F)(4), the Supreme Court apparently determined that the delays caused by lengthy discovery proceedings, such as interrogatories and depositions would unduly burden the process.

However, while the rules state that there should be a speedy resolution of attorney discipline matters, they contain no limitation as to amount of time the Grievance Administrator has to conduct an investigation and there is no statute of limitation applicable to bringing charges of attorney misconduct. In addition, the Grievance Administrator has the power during his investigation to "issue subpoenas to require the appearance of a witness or the production of documents or other tangible things...." MCR 9.112(D). A respondent has no such right in the pre-complaint stage.

Thus, the Grievance Administrator could take years subpoenaing third parties and respondents for statements and documents in the name of pre-complaint investigation.[5] Then, as he has in these cases, the Attorney Grievance Administrator could assert to this Board that the rules require a speedy disposition and that the disclosure of information which he has in his possession would improperly delay the process and result in a "fishing expedition."[6]

The Supreme Court has indicated that the Grievance Administrator should conduct discovery in the pre-complaint stage to insure that there is a sufficient basis for the charges before filing a formal public complaint. Anonymous v Attorney Grievance Comm'n, 430 Mich 241, 253 (1988).

MCR 9.115(F)(4) is meant to eliminate the general discovery

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[5]It is our understanding that frequently the witness statements (including statements of respondents) are actually depositions conducted by one party -- the Attorney Grievance Administrator.

[6]For example, in Lubienski, the request for investigation was filed in 1986 and the Grievance Commission filed its formal complaint in 1992. The Grievance Administrator provided to respondent a list of 35 witnesses under MCR 9.115(F)(4). Respondent's counsel said that much of the information was worthless. He hired an investigator to interview these witnesses who found that several of the addresses were incomplete or invalid. Respondent believes that the Grievance Administrator has statements from many or all of these witnesses. We agree with respondent that his request to see these statements is not a "fishing expedition" and the statements would have more than minimal value. At the very least, disclosure of the information may have reduced respondent's costly investigation.

utilized in civil circuit court matters which add time and expense to the process. In providing for the Grievance Administrator's discovery in the pre-complaint stage and in streamlining the post-complaint hearing process, the Supreme Court did not mean to prohibit the disclosure of exculpatory information to respondents, especially when the process could result in public disgrace and a deprivation of the ability to earn a livelihood. While the rules may be designed for a speedy process, they are not meant to give the Grievance Administrator an unfair advantage and to deprive respondents of exculpatory information.[7]

There is no evidence that production of the requested information would delay the process. Respondents are only requesting information that the Grievance Administrator has in his files. The production of such information could in fact speed up the hearing because the respondents could better prepare in advance.

We conclude that MCR 9.115(F)(4) does not prohibit disclosure of the requested information.

II.

The Grievance Administrator also asserts that the investigation must remain confidential under MCR 9.126, and thus he is prohibited from disclosing the requested information.

The confidentiality rule applies to the investigative stage of the proceeding. It is designed to protect attorneys from allegations which have not yet become public and could have an irreparable impact on their reputations and practices. Anonymous v Attorney Grievance Comm'n, supra; Leitman v State Bar Grievance Board, 387 Mich 596, 600 (1972). In these cases, the investigative stage had been concluded, formal complaints had been filed and the allegations had become matters of public record before respondents requested the information. MCR 9.126.

The Grievance Administrator's argument that there is a "public/witness protection" need for confidentiality in the post-complaint stage is self-serving at best. The need to maintain the confidentiality of information that the Grievance Administrator

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[7]The Grievance Administrator relies on Anonymous v Attorney Grievance Comm'n, 430 Mich 241 (1988) for the proposition that the Supreme Court has interpreted MCR 9.115(F)(4) as limiting discovery. The question in Anonymous was whether the Grievance Commission had the power to compel an attorney under investigation to appear as a witness and produce documents. The Court held that the Commission had such power because the Commission must gather information in the pre-complaint stage to protect the public and the "attorney who might otherwise be faced with insufficiently investigated accusations." 430 Mich at 253. The Court did not address the questions of whether respondents had a right or need to obtain exculpatory information or whether such information is "discovery" under MCR 9.115(F)(4) or "disclosure" outside of the rule. In civil cases, a party does not have the right to compel appearances and documents before filing a complaint. In attorney discipline cases, only the "prosecuting arm" has that power.

chooses not to introduce at a hearing is no greater than the need to maintain the confidentiality of information which he chooses to introduce at a hearing. The parties agree that the later category of information must be disclosed under MCR 9.115. Under the Grievance Administrator's interpretation, he determines whether information remains confidential after a complaint has been filed, and the question of whether to disclose exculpatory information thus becomes one of adversarial strategy, not protection of the public or even the witness.

That this is not a question of public protection was highlighted during oral argument. When asked about the need for confidentiality, the attorney for the Grievance Administrator could come up with only one example -- in the occasional situation where a judge calls the Commission with hearsay information about an attorney. See transcript of oral argument at 208-210.

Under the Rules of Professional Conduct, lawyers (including judges) have the obligation to report "another lawyer who has committed a significant violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer" regardless whether the report will be made public or disclosed to respondents. MRPC 8.3(a). And, the Grievance Administrator has the power to compel cooperation through his subpoena power. MCR 9.112(A). These provisions provide sufficient protection from the suspected fear of non-reporting and non-cooperation.

Clients file the majority of the complaints against lawyers. A complaining client knows or promptly learns that his or her complaint will be disclosed to the lawyer. MCR 9.112(C)(1). Typically, the client is a necessary witness and documents in the client's possession would be used at a hearing. Thus, the client should have no expectation that the information he/she provides would remain confidential.

In Sadler v Oregon State Bar, 550 P2d 1218 (1976), the Oregon State Bar argued that individuals would be reluctant to complain against lawyers if they knew their complaints might become public. In responding to this argument, the Oregon Supreme Court declared:

> There is no evidence to prove, nor is it logical to assume, that the complainant would hesitate to criticize an attorney if such criticism would become public knowledge. The Bar's point that attorneys and judges would be reluctant to report their brethren seems more valid. A study of Bar discipline across the nation concluded that:
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> > " ... Lawyers rarely complain to disciplinary agencies about other lawyers. Judges, too, are reluctant to complain to disciplinary agencies about either lawyer performance or lawyer conduct. Instead clients most frequently supply the

regulatory inputs."

550 P2d at 1221 (quoting Marks and Cathcart, Discipline Within the Legal Profession: Is It Self Regulation? 1974 Ill Law Forum 193, 207).

In his brief, the Grievance Administrator relies on In re Mikesell, 396 Mich 517 (1976) (a Judicial Tenure Commission case). There, the master ordered the production of certain records. On appeal, the respondent judge did not identify any documents that he did not, but should have received. Thus, the Court was not faced with the question of whether certain information should have been disclosed. Mikesell does not stand for the proposition that respondents in attorney discipline cases (or even Judicial Tenure Commission cases) should be denied exculpatory information.

In any event, Judicial Tenure Commission proceedings are different from attorney discipline proceedings. First, our Supreme Court has termed attorney discipline cases as "quasi criminal" and disbarment as "highly penal." Woll, supra; Baluss, supra. On the other hand, the Court has declared that judicial tenure cases are not "quasi penal in nature." Mikesell at 527.

Second, in Judicial Tenure Commission proceedings, the Supreme Court reviews the matter de novo and decides whether and to what extent the judge should be disciplined. Under our rules governing attorney discipline, the respondent has no right to have the case decided by a court.

Finally, litigants and lawyers may be reluctant to lodge complaints against a judge if they knew that the judge would be given that information, especially if the judge were in a position to make rulings on matters affecting them. The same concern does not exist in attorney discipline cases.

The Grievance Administrator has not demonstrated a need to keep exculpatory information from respondents and the rules do not so require.

III.

Respondents assert that the Grievance Administrator's position would render the rule unconstitutional and fundamental fairness requires the Grievance Administrator to disclose the requested information.

The Grievance Administrator counters by arguing that in implementing MCR 9.115(F)(4), the Supreme Court necessarily considered and ruled that the limitation on disclosure of information (assuming we agree with the Grievance Administration's reading of the rule) is constitutional and thus fundamentally fair.

First, the Supreme Court's implementation of court rules under its administrative power is not equivalent to its rulings in cases

where adversaries present and refine issues for the Court's consideration. In the latter situation, the issues are litigated and the Court focuses on the specific issues in dispute. In the former situation, there is no actual case in controversy and there are no issues that are litigated.

We do not mean to suggest that the Court would intentionally adopt an unconstitutional court rule any more than the legislature would intentionally enact an unconstitutional statute. However, it cannot be said that in its quasi legislative rule making function the Court is simultaneously acting in its judicial capacity to review and rule on the constitutionality of its rules.

Indeed, the Court has recognized that one or several of its rules could be found to be unconstitutional. For example, in State Bar Grievance Administrator v Jacques (on remand), 407 Mich 26 (1979), the Court in effect ruled that certain disciplinary rules were unconstitutional. See also, MCR 9.102(B) which recognizes that a court rule could be found to be invalid and the comments to MCR 6.001 which state: "As with the other Michigan court rules, constitutional requirements apply independently of these rules and in the event of any conflict, prevail over the requirements of these rules."

We recognize that "discovery" is not a constitutional right. Matter of Del Rio, 400 Mich 665, 686 (1977).[8] However, respondents are not asking for discovery in the broad sense. They seek potentially exculpatory information which the prosecutor has in his possession and which the prosecutor could choose not to disclose to respondents or the finder of fact.

The Grievance Administrator recognizes that he has the duty to develop a full and fair record. See transcript of oral argument at 72.[9] Nevertheless, the Grievance Administrator uses MCR 9.115(F)(4) as a bootstrap to maintain that the disclosure to respondents of even the most blatant exculpatory evidence is prohibited unless the Grievance Administrator intends to use the information at the hearing. He adds buckles to the bootstrap by

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[8] Del Rio is a Judicial Tenure Commission case. There, the respondent claimed that his due process rights had been violated because he was denied discovery, but the facts were to the contrary. Respondent was afforded discovery and he did not identify any items that were withheld from him that he should have been given.

[9] The Grievance Administrator cites State Bar Grievance Administrator v Jacques, 401 Mich 516 (1977), but failed to disclose that the opinion had been vacated. 436 US 952 (1978). Assuming that the vacated Jacques opinion is binding, its holding that the Grievance Administrator is not required to produce all res gestae witnesses does not mean that respondents are not entitled to obtain exculpatory information. A requirement to produce all witnesses who have knowledge of the misconduct is far more burdensome and costly than a requirement to disclose exculpatory information. Moreover, the Jacques Court recognized that the question of "fundamental fairness" should be addressed separate from the court rules and that the Grievance Administrator has the duty "to seek justice and to develop a full and fair record." 401 Mich at 529, 534.

arguing that the failure to disclose such information to respondents does not violate his duty to develop a full and fair record because the Supreme Court adopted the rule prohibiting the disclosure.

During oral argument, the attorney for the Grievance Administrator said we must trust the Attorney Grievance Commission (prosecutor) to determine when exculpatory information should be introduced at a hearing and thus when the information would be available to respondents:

> SECRETARY FIELDMAN: Well let's take the most extreme example. Let's say under anyone's stretch of the imagination you have evidence that is exculpatory.
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> MR. CUNNINGHAM: Yes.
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> SECRETARY FIELDMAN: You're going to use a witness to testify, and you have another witness who has said that this first witness confessed to him he was lying, and he was making this whole thing up because he wanted to get some money in a malpractice case or something else.
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> Also, let's say you have the most blatant evidence that it's exculpatory. Is it your position that you don't have to turn that over?
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> MR. CUNNINGHAM: Yes. I do not have to turn that over because of the fact that we have a different type of proceeding here than we do in a criminal matter.
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> * * *
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> SECRETARY FIELDMAN: -- would you say that that's fair?
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> MR. CUNNINGHAM: Yes, because of the way the system is set up. It's not the matter of the prosecutor, it's not the matter of the prosecutor standing as the representative of the state or the liberty interest of the individual. This is a matter of the Commission being there present to review that type of evidence, or have that type of evidence available, and the matter brought forward to it.
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> * * *
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> SECRETARY FIELDMAN: Now would you say that you're developing a full and fair record * * * by not admitting -- by not letting anyone know about the exculpatory evidence?
>
> MR. CUNNINGHAM: It's not that I don't let anybody know about it, I don't let the respondent know about it. * * * Yes, that goes in front of the Commission. That's a

> decision the Commission should have full knowledge of and to decide the value, if any, to that extent.
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> CHAIRMAN BURNS: The Commission is nothing more or less than a prosecutor; it happens to be a number of people.
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> MR. CUNNINGHAM: Yes. *** There's an act of faith here that if something clears that person, and the act of faith, we're not going to give the prosecutor in a criminal case the act of faith, but we are going to make that leap of faith in regard to the disciplinary proceeding because of the following procedures.
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> CHAIRMAN BURNS: Then our decision, which will be reviewed by the Supreme Court, should be that we have faith that in every instance, the prosecutor will make the right decision and therefore, we interpret the rules as the prosecutor asks us?
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> MR. CUNNINGHAM: No. We can say that there are avenues within the process of rectifying any errors that are made -- * * * I'm an at will employee, I try to hide evidence from the grievance administrator, I'm out the door.
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> * * *
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> MR. BUSHNELL: And what does that do to the respondent, what happens to respondent? You get fired, but in the meantime, his license has been taken away.
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> MR. CUNNINGHAM: Again, sir, I think our disagreement is that the respondent's life is being destroyed. I think that we do have that different interest in the license in the criminal.

Transcript of oral argument at 70-72, 73-75.[10]

Short of suborning perjury, we cannot imagine a more fundamental violation of the duty to seek justice and develop a full and fair record than to conceal exculpatory information from respondents as the Grievance Administrator here insists is appropriate and required. We do not assume that the Grievance

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[10]Under MRPC 3.8(d), a prosecutor in a criminal case must: 1) "refrain from prosecuting a charge that... is not supported by probable cause"; and 2) "make timely disclosure to the defense of all evidence or information ... that tends to negate the guilt of the accused or mitigates the degree of the offense." We agree with the Grievance Administrator that, by its terms, MRPC 3.8(d) applies only to prosecutors of criminal cases. However, the Attorney Grievance Commission is "the prosecution arm of the Supreme Court for discharge of its constitutional responsibility to supervise and discipline Michigan attorneys." MCR 9.108(A). It is incredible that a body charged with carrying out a prosecutorial function under state Constitution sees no obligation to disclose evidence that negates or tends to negate the charges brought and goes so far as to state that it is prohibited from disclosing such information unless it intends to use the information at a hearing.

Administrator or the Grievance Commission has any ill motive. They may truly believe in a given situation that the exculpatory information is not credible. However, respondents are entitled to have the finder of fact make credibility determinations. The Grievance Administrator's circuitous argument to the contrary, he should not be permitted to manipulate the truth seeking process under the guise of discovery limitations and confidentiality. More importantly, such manipulation would be fundamentally unfair.

The Grievance Administrator argues that attorney discipline matters are administrative and quasi judicial in nature and thus the requirements for procedural due process in attorney discipline cases are different from the requirements in criminal cases. He urges the Board to apply the three part test set forth in Mathews v Eldridge 424 US 319; 96 Sct 893; 47 Led 2d 18 (1976) and Pitoniak v Borman's, Inc. 104 Mich App 718 (1981). He also cites State Bar v Estes, 390 Mich 585 (1973).[11] Yet, the Grievance Administrator has cited no example where exculpatory information was properly withheld from a person facing a license revocation in any calling or profession.

Attorney discipline matters are quasi judicial in that the trials (hearings) are not conducted by judges, but by Supreme Court delegates who function as its adjudicative arm. MCR 9.110. See also, In re Grand Jury 89-4-72, 932 F2d 481 (6 CA 1991), cert den ___ US ___; 112 Sct 418; 116 Led 2d 438 (1991). The hearing panels provide for a fair and impartial administrative tribunal. See Pitoniak, supra. However, merely because the hearing panels provide a fair forum, it does not necessarily follow that the failure to turn over exculpatory information satisfies the requirements of fundamental fairness.

Whether the matter is approached by focusing on the question of fundamental fairness or on the question of whether the rule satisfies the Mathews v Eldridge test, the result is the same -- the information should be disclosed. The three factors identified in Mathews v Eldridge are:

> ... first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 US at 335.

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[11] Estes did not address any question involving the fairness of procedures. Estes involved the question of the appropriate appellate standard of review.

Assuming Mathews applies, it is favorable to respondents. As discussed above, our Supreme Court has recognized that attorney discipline proceedings are quasi criminal in nature. Therefore, the private interest of protecting a respondent's license to practical law is similar to the interest of a criminal defendant. At least, the private interest concerns the protection of a person's public reputation and the ability to earn a livelihood. State Bar Grievance Administrator v Fried, 388 Mich 711 (1972).

The risk of an erroneous deprivation of the interest is great where, as here, a party may be deprived of information which could mitigate culpability and the agency which is charged with convincing the fact finder to limit or prevent the party from practicing his profession because of culpability, has the complete authority to withhold that information.

The Grievance Administrator asserts that the risk is "practically, if not completely" non-existent because respondents a) receive notice of the charges; b) receive service of pleadings; c) may be represented by counsel; d) have a fair hearing panel; and e) may appeal. However, the question is not whether the rules provide for certain procedural safeguards, but rather whether the deprivation of exculpatory information imposes a risk that the interest will be erroneously deprived. Without question, the risk of such an erroneous deprivation is present here.

The value of providing the information is self-evident -- it would substantially reduce the risk of an erroneous deprivation of the interest. The state, through its adjudicative branch, has a substantial interest in regulating the legal profession. However, the Grievance Administrator has not articulated a governmental or public interest which would be adversely affected by the disclosure of exculpatory information. The information is readily available and thus disclosure would not delay the proceedings or involve a significant fiscal or administrative burden on the Grievance Administrator.

Applying the test urged by the Grievance Administrator, the substantial private interest of a respondent in a public discipline proceeding outweighs the insignificant burden placed upon the Grievance Administrator by allowing disclosure of the exculpatory information already in his possession.

The disciplinary rules are designed to protect "the public, the courts, and the legal profession." MCR 9.102(A). Disclosure to respondents of exculpatory information does not contravene this rule. It is just as important to insure that lawyers are not unjustly or improperly discipline for misconduct they did not commit as it is to discipline lawyers for misconduct they did commit. We do not serve the public, the courts or the legal profession by permitting a finding of misconduct and a resulting suspension or revocation of a law license where information which could have negated or mitigated the charges is withheld from the party who has been charged with misconduct.

While respondents are not entitled to the full panoply of rights afforded criminal defendants, fundamental fairness and the Grievance Administrator's duty to seek justice and develop a full and fair record require that the Grievance Administrator disclose the requested information to respondents.

Appendix "A"

Summary of Investigative Material Sought and Hearing Panel Disposition

I Matter of Jay A. Bielfield, ADB 87-88

The Respondent requested all witness statements taken from any person by the Grievance Administrator or his staff during the investigation relating to the complaint against the respondent.

In its order dated March 5, 1993, Tri-County Hearing Panel #69 granted respondent's motion and ordered the Grievance Administrator to provide "any and all witness statements, sworn or otherwise given before him or his agent or taken by any person from said Grievance Administrator's office, to the respondent well prior to trial".

II Matter of Albert Lopatin, 92-224-GA

Respondent requested:

A) Statements provided by witnesses to the Grievance Administrator;

B) A list of individuals interviewed by the Grievance Administrator but not identified by the Administrator as witnesses who may be called;

C) Statements of individuals not identified as witnesses; and,

D) Documents in the possession of the Grievance Administrator which the Administrator does not intend to introduce at the hearing.

In its order dated January 12, 1993, Tri-County Hearing Panel #26 granted respondent's motion in part, and ordered the Grievance Administrator to provide the witness statements [Part A], a list of individuals interviewed [Part B], and documents in the possession of the Grievance Administrator [Part D]. The panel denied the request for statements of individuals not named as witnesses [Part C]. The panel ruled unanimously only as to Part A--statements by individuals identified as witnesses. Panel Member Albert Calille dissented as to Parts B and D on the grounds that the hearing panel was without authority to expand the scope of discovery embodied in MCR 9.115(F)(4). Panel Chairman Arthur Tarnow dissented as to the denial of the respondent's request for statements of individuals not called as witnesses by the Grievance Administrator [Part C] on the grounds that denial of the information to respondent constitutes a denial of due process guaranteed by the constitutions

of Michigan and the United States.

III Matter of Richard M. Maher, 92-225-GA

Respondent requested:

1) Written or recorded statements or notes of statements given by the respondent to the Grievance Administrator;

2) Statements by any individual interviewed during the Grievance Administrator's investigation of the charges against the respondent;

3) A list of all persons interviewed during the Administrator's investigation;

4) Tangible objects in the Administrator's possession, including tapes or film; and,

5) All exculpatory information.

In its order of December 18, 1992, Tri-County Hearing Panel #2 granted the respondent's motion in part, and ordered the Grievance Administrator to provide statements given to the Grievance Administrator by the respondent or individuals listed by the Administrator as witnesses. The panel denied respondent's other requests.

IV Matter of Ricardo Lubienski, 92-157-GA

Respondent requested:

1) Written or recorded statements given to the Grievance Administrator by the respondent;

2) Statements or notes of statements taken from individuals by the Administrator or his investigators during their investigation;

3) A list of all persons interviewed during the investigation;

4) A statement of the consideration or inducement given or offered or threats made or suggested to any person interviewed in connection with the investigation and the criminal record of such persons;

5) Investigative reports and memoranda;

6) All tangible objects including photographs, tapes or film; and,

7) All exculpatory information.

In its order dated January 14, 1993, Tri-County Hearing Panel #8 denied respondent's request, with the exception of the material specifically identified in MCR 9.115(F)(4), i.e. the names and addresses of all witnesses intended to be called and inspection of all documents intended to be introduced.