STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator
State of Michigan
Attorney Grievance Commission,

Petitioner,

v

William D. Frey, P 33806,

Respondent.

Case No. 92-184-GA

MEMORANDUM OPINION

A formal complaint charging that attorney William D. Frey committed acts of professional misconduct warranting discipline was filed by the Grievance Administrator on July 28, 1992. In accordance with MCR 9.110(D)(3), the case was assigned to Tri-County Hearing Panel #23 (Russ E. Boltz, Chairperson; Michael G. Vartanian, Vice-chairperson; and, Timothy W. Lake, Secretary). The complaint was served upon the respondent on July 28, 1992 and the respondent's answer was filed on August 14, 1992. A scheduling conference was conducted by the hearing panel on September 22, 1992. It was attended by the three panel members, the respondent and counsel for the respective parties.

On September 25, 1992, the Grievance Administrator filed a Motion to Disqualify hearing panel member Michael G. Vartanian. The Motion recites that: 1) Michael G. Vartanian (Vartanian) is a partner in the law firm of Dickinson, Wright, Moon, VanDusen & Freeman (Dickinson, Wright); 2) Another member of that law firm; George Ashford (Ashford), is the respondent in a separate unrelated proceeding before another hearing panel. 3) Both Ashford and respondent Frey are represented by Detroit attorney F. Philip Colista; and, 4) In his representation of Ashford, attorney Colista has filed a motion for production of sworn statements and it is anticipated that Colista will file a similar motion in this case on behalf of his client Frey.

It is the petitioner's position that these facts and circumstances create "a likelihood of bias or an appearance of bias on the part of hearing panel member Michael G. Vartanian and require Mr. Vartanian to disqualify himself from this case."

The affected panel member has declined the Grievance Administrator's request that he disqualify himself. Therefore, in accordance with the provisions of MCR 9.115(F)(2)(a), this motion must be decided by the Board's chairperson under the guidelines of MCR 2.003.

First, it should be noted that the motion was not timely filed. MCR 9.115(F)(2)(a) allows the filing of a motion to disqualify a panel member "within the time permitted to file an answer". The complaint in this case was served on July 28, 1992. The time within which to file answer expired August 18, 1992. Although the hearing panel discussed the matter of pretrial motions at some length at the prehearing conference conducted on September 22, 1992, the Administrator's counsel gave no indication at that hearing that there would be any objection to the continued participation of panel member Vartanian. The motion contains no explanation for its untimeliness, such as a claim that the petitioner was unaware of this panels member's affiliation with the Dickinson, Wright firm.

This Motion to Disqualify is not denied because it was not timely. In addition to the admonition of MCR 9.102(A) to construe these rules liberally for the protection of the public, the courts and the legal profession, consideration of disqualification motions in particular should not be governed solely by time limitations if substantial and compelling grounds for disqualification are established. Nevertheless, the decision maker should at least have an opportunity to consider the reasons for a party's failure to file a pleading within the time period provided in the rule.

The grounds for the disqualification of a hearing panel member are those which govern the disqualification of a judge under MCR 2.003(B). That sub-rule provides generally that a judge is disqualified when he or she cannot impartially hear a case, including the situations covered under sub-rules (B)(1-7). Of these, the grounds identified in MCR 2.003(B)(1, 3-7) are inapplicable to this case. There is no claim that panel member Vartanian has any financial, professional, familial or corporate relationship with the Grievance Administrator or Mr. Frey or that he is disqualified as a matter of law.

This motion has therefore been considered under MCR 2.003(B)(2)with regard to the likelihood that panelist Vartanian is biased or prejudiced for or against the Grievance Administrator or that his association with the Dickinson, Wright law firm will create an appearance of bias.

The Grievance Administrator properly asserts that it is not necessary to show actual bias on the part of the decision maker and that disqualification may be appropriate where experience teaches that the mere probability of bias is too high, Crampton v Department of State, 395 Mich

347, 351 (1975). In a 1991 opinion, the Attorney Discipline Board recognized that actual bias or prejudice need not be shown. Matter of Joseph W. Moch, ADB 131-88, 6/25/91, citing Glass v State Highway Commissioner, 370 Mich 483 (1963).

In this case, however, it must be emphasized that there is no allegation that panelist Vartanian has actually engaged in any specific conduct or made any statement which could be construed as evidence of bias or prejudice for or against either party or their respective counsel.

It must be presumed that the Supreme Court recognized when it established our system of professional discipline that the volunteer attorneys who are appointed as panel members are likely to be active, practicing members of the bar with the social, business and professional relationships which one would expect to find among any group of attorneys. If all social or professional relationships between attorneys are seen as suspect, the Board's roster of eligible panelists would be drastically reduced.

I do not believe that it is enough to speculate that a certain relationship could conceivably create an appearance of impropriety. This is especially true when no objective evidence of bias or prejudice is offered. Instead, I believe that the test for an appearance of bias is closer to the test which has been adopted under federal rules governing the disqualification of judges, that is, whether an objective, disinterested observer fully informed of the facts underlying the grounds on which recusal is sought would entertain a significant doubt that justice would be done in the case. Pepsico v McMillan, 764 F2d 458, 460 (1985).

Based upon the facts alleged in this motion, I do not believe that objective, disinterested observers would entertain significant doubts that Mr. Vartanian could discharge his obligations as a panelist in this case fairly and impartially.

It is argued that there is a likelihood of bias or appearance of bias on the part of Mr. Vartanian because another member of his firm is the subject of a disciplinary prosecution by the Attorney Grievance Commission in an unrelated matter before another hearing panel. In considering the importance of Vartanian's affiliation with the Dickinson, Wright law firm, an impartial observer is entitled to consider that the law firm in question is not a small partnership consisting of a handful of attorneys practicing together in close physical proximity but is one of the largest law firms in Michigan with offices in four Michigan cities, Washington, D.C., Chicago and Warsaw, Poland. With well over 200 partners and associates, that single law firm has more attorneys than approximately seventy of Michigan's eight-three counties. The Motion to Disqualify does not suggest that panelist Vartanian and George Ashford have any social or professional affinity whatsoever except for partnership in the law firm. It has not

been suggested how any action or ruling by panelist Vartanian in the Matter of William D. Frey could potentially result in any benefit to George Ashford or the Dickinson, Wright firm. Mr. Vartanian is not involved in any way in the one case which could have an impact on Mr. Ashford and Dickinson, Wright--the separate proceeding against Mr. Ashford himself. Assuming that Mr. Vartanian was inclined to do all that he could to help his partner Ashford, it has not been shown how his rulings in the Frey case could achieve that result. A panel's procedural rulings in a specific case have no binding effect on other hearing panels.

Secondly, the Motion recites that F. Philip Colista, the attorney representing respondent Frey in this case, is also representing Mr. Vartanian's partner. Again, the likelihood of bias or an appearance of bias has not been established. An attorney representing a respondent before a particular panel member may represent other respondents in other unrelated matters before other hearing panels. Given the fact that a favorable ruling to that attorney's client in one case would not inure to the benefit of other respondents in other cases, I cannot conclude that Mr. Colista's appearance on behalf of respondent Frey raises a significant doubt that justice will be done by the hearing panel. With regard to the possibility that the Dickinson, Wright firm may be contributing to the payment of Ashford's legal fees, this argument is not only based entirely on speculation but fails to suggest any financial interest which would be affected in any way by the outcome of the Frey matter.

Finally, it is argued that Mr. Vartanian and his fellow panelists will be asked to rule on a motion for production of witness statements and that a similar motion was filed by Mr. Colista on behalf of respondent Ashford. This argument is not persuasive. The panel's rulings on procedural issues in Frey will affect only the Frey case. Even if a panel member were so inclined, a ruling characterized by the most partisan observer as "rewarding" or "punishing" either party before a panel would not result in a benefit to another respondent appearing before another panel in an unrelated case.

By their very nature, motions to disqualify which do not allege actual bias or prejudice must be limited to the unique facts presented in that case. The denial of the motion to disqualify panel member Vartanian in this case is based on the conclusion that these facts would not create a significant doubt in the mind of an objective observer that justice will be served. The Supreme Court has entrusted the trial of these public disciplinary proceedings to panels composed of licensed attorneys. Like other attorneys, panel members have business, social and professional relationships with judges and other lawyers. It has not been shown that this panel member has a personal or financial interest in the outcome of the case before him. His relationship with another respondent in an unrelated case is not a relationship which, in-and-of-itself, suggests a likelihood of bias.