Grievance Administrator,
Petitioner/Appellant,
v
Lawrence A. Baumgartner, P-25163,
Respondent/Appellee.

ADB 65-88; 109-88

Decided: July 31, 1989

BOARD OPINION

The Grievance Administrator has appealed the dismissal of a formal complaint in this matter and claims that the hearing panel erred in ruling that MCR 9.126(A) barred the introduction of the respondent's answer to the request for investigation into evidence. The panel's evidentiary ruling is reversed. An attorney's answer to a request for investigation as well as other evidence obtained by the Grievance Administrator during the course of an investigation may be disclosed at a subsequent public hearing and, if otherwise admissible, may be received into evidence. Nevertheless, we affirm the hearing panel's decision to dismiss based upon the petitioner's refusal to proceed with proofs following the panel's evidentiary ruling.

The Grievance Administrator's complaint charged that the respondent was retained by Leon Rodgers in May 1986 to contest a default judgment of divorce. Count I charged that Mr. Baumgartner failed to appear at a hearing on June 2, 1986, resulting in the entry of a default judgment against his client . Count II charged that respondent told his client that he intended to file a motion for reconsideration and, if he was not successful, that he would file an appeal. It was alleged that his failure to take further action on his client's behalf constituted misconduct.

The respondent filed an answer to the complaint. He admitted that he did not appear at the hearing but stated that he was led to believe by opposing counsel that the default judgment would not be presented without prior notice. In answer to Count II, he stated that he was not, in fact, retained to pursue the appeal and that he specifically advised the client that an appeal was not worth pursuing.

At the hearing on October 18, 1988, counsel for the Grievance Administrator called the respondent as an adverse witness in accordance with MCR 9.115(H). The respondent's testimony that he was not retained to pursue an appeal was consistent with his answer to the formal complaint. The respondent's answer to the request for investigation was then marked as an exhibit and offered into evidence. Respondent's counsel objected on the grounds that an answer to a request for investigation is information received during the Grievance Administrator's investigation and is therefore strictly confidential within the meaning of MCR 9.126(A). After some discussion, the hearing panel sustained the respondent's

objection and ruled that the respondent's answer to the request for investigation could not be made public.

Following the panel's denial of the petitioner's motion to adjourn and take an interlocutory appeal and dismiss without prejudice, the Grievance Administrator's counsel indicated that he could not proceed in view of the panel's ruling. Counsel specifically stated that he could not proceed because the panel's ruling prevented him from impeaching the respondent. The respondent's motion to dismiss with prejudice was granted by the panel.

This case presents two questions: 1) Does MCR 9.126(A) preclude the disclosure of an attorney's answer to a request for investigation at subsequent disciplinary hearings which are "public" in accordance with MCR 9.115?, 2) Under the circumstances of this case, was the Grievance Administrator's counsel justified in refusing to go forward with proofs following the panel's refusal to allow evidence offered for the purpose of impeachment? We conclude that both questions must be answered in the negative.

In its report, the hearing panel cited MCR 9.126(A) which directs that "investigations by the administrator or the staff may not be made public" and MCR 9.126(B) which directs that "hearings before a hearing panel and the Board must be open to the public." The panel reasoned that matters obtained by the Grievance Administrator during investigation, including the respondent's answer to the request for investigation, would be made "public" if considered at a hearing and they must therefore be excluded from evidence.

Such a ruling is clearly at odds with the Supreme Court's charge in MCR 9.102(A) that these rules are to be liberally construed for the protection of the public, the courts and the legal profession. Further, such a ruling would prevent enforcement of other sections of sub-chapter 9.100. We note for example, that MCR 9.104(6) states that an attorney commits an act of misconduct when he or she "makes a knowing misrepresentation of any fact or circumstance surrounding a request for investigation." The panel's ruling, if allowed to stand, would prevent the Grievance Administrator from offering any evidence in support of such a charge since the alleged misrepresentation was obtained during the course of the Grievance Administrator's investigation. Such a result was clearly not intended when these rules were drafted.

The position urged by the respondent would prevent the Grievance Administrator from presenting the testimony of a complainant on the grounds that such testimony would simply repeat information originally disclosed to the Administrator in the initial investigation. Similarly, that interpretation of the rules would prohibit the introduction of bank records and other documentary evidence obtained by the Grievance Administrator during the investigative stage of these proceedings. In short, the Administrator would effectively be barred from prosecuting most

cases.

The confidentiality requirements of MCR 9.126(A) were intended to protect the professional and personal reputations of attorneys against whom groundless complaints have been lodged by members of the public. However, once a formal complaint has been filed with the Board in accordance with MCR 9.115(B), those considerations of confidentiality no longer apply. We cannot conceive that the Supreme Court intended that MCR 9.126(A) be used to prevent the introduction of evidence which otherwise would be admissible.

Having ruled that the panel erred in sustaining the respondent's objection to the admissibility of his answer to the Request for Investigation, we must nevertheless sustain the hearing panel's final decision to dismiss the complaint. The Grievance Administrator's counsel, having received the panel's adverse ruling on that proposed exhibit, simply refused to go forward with the proofs. Under the circumstances, the hearing panel had no choice but to dismiss for the obvious reason that he had failed to sustain the burden of proof and had failed to established the misconduct charged in the complaint by a preponderance of the evidence.

The complaint before the hearing panel did not charge the respondent with misrepresentation in his answer to the Request for Investigation or in his other communications with the Grievance Administrator. Introduction of the respondent's answer to the Request for Investigation has not been shown to be an essential element of the charges in the complaint. It was offered solely for the purpose of impeaching the respondent by challenging his credibility. Admissibility was sought on the grounds that it constituted a statement against interest. (Hrg. Tr. 10/18/88 p. 23.)

As the hearing panel chairman observed, "Impeachment does not prove a case. Evidence does." The complaint in this case charged, in essence, that the respondent neglected his duties as an attorney for Leon Rodgers in a divorce case by failing to appear at a hearing on June 2, 1986 and by failing to take action on his client's behalf to reopen the case after his motion to set aside default judgment was denied on June 16, 1986. The record below discloses that the complainant, Leon Rodgers, was present in the hearing room and he was, presumably, prepared to testify. The respondent, Lawrence Baumgartner, had commenced his testimony under cross-examination as an adverse witness. It has not been established to the Board's satisfaction that the panel's adverse ruling on evidence offered for impeachment "prevented" the introduction of further evidence. The panel's evidentiary ruling was not appropriate grounds for an interlocutory appeal nor was it appropriate for the disappointed party to refuse to proceed.

(Board Members Gurwin, Zegouras, Doctoroff, Hotchkiss and Keating concur in this decision.)