STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,
State of Michigan
Attorney Grievance Commission,

Petitioner/Appellant,

v

Sheldon L. Miller, P 17785,

Respondent/Appellee.

Case No. 90-134-GA

Decided: October 18, 1991

BOARD OPINION

This matter has been brought before the Attorney Discipline Board by the Grievance Administrator who seeks an increase in the discipline imposed by a hearing panel. The panel concluded that the respondent, Sheldon Miller, engaged in an ex-parte discussion with a judge regarding a pending case in violation of Rule 3.5(B) of the Michigan Rules of Professional Conduct. A second count which charged that respondent obtained entry to the judge's chambers by misrepresenting the purpose of his visit was dismissed by the panel. Following a separate hearing to receive evidence of aggravating and mitigating factors, the panel issued its separate report on discipline and filed an order of reprimand.

It is urged by the Grievance Administrator that the seriousness of the misconduct in this case requires that respondent be suspended for at least ninety days in order to maintain the integrity of the legal profession, to protect the public and the courts and to deter other attorneys from engaging in similar misconduct. We do not disagree with the assertion that ex-parte communications of this sort may seriously undermine the credibility of the judicial system. We take this opportunity to reiterate the finding of the hearing panel that such an occurrence 'is anathema to our profession" and to emphasize that the misconduct in this case cannot be characterized as trivial or technical in nature. Nevertheless, after careful consideration we are unable to conclude that a public reprimand in this case is wholly inconsistent with the goals of these disciplinary proceedings. The hearing panel's conclusion that protection of the public, the courts and the legal profession may be achieved in this case by the imposition of a reprimand is affirmed.

Neither party seeks review of the hearing panel's findings on the issue of misconduct. While the statements of fact submitted by the parties differ in several respects, the single most essential fact is not in dispute. On April 24, 1989, the respondent, who was then co-counsel for the plaintiff in a contract case pending before Wayne County Circuit

Court Judge Charles Farmer, obtained entrance to Judge Farmer's chambers. Opposing counsel was not present and the respondent had provided no notice to opposing counsel that he intended to see the judge. Three days earlier, on April 21, 1989, a hearing had been held before Judge Farmer on defendant's motions for a judgment notwithstanding the verdict, a new trial and remittitur following a jury award to respondent's client of approximately 2.7 million dollars. In his conversations with the judge on April 24th, the respondent utilized the jury form which was on Judge Farmer's desk to make suggestions that certain amounts awarded by the jury were duplicative and that the verdict should be reduced by the amount of $500,000. At no time during or after the conversation did the respondent notify opposing counsel of his direct communication with the judge on this issue. Opposing counsel did not learn of the communication until August 1, 1989 when Judge Farmer recused himself, citing his April 24, 1989 conversation with the respondent as an intrusion which was "upsetting and provoked anger and indignation to the extent that I did not and still do not possess the requisite reasoning and objectivity to provide the necessary justice that the parties deserve". (Exh. 43, Tr. p. 26)

At the time of his meeting with the judge, the respondent's actions as an attorney were governed by the Michigan Rules of Professional Conduct which became effective October 1, 1988. Rule 3.5(B) of those Rules specifically directs that a lawyer shall not communicate ex-parte with a judge concerning a pending matter, except as permitted by law.

Respondent Miller has never denied his participation in the April 24, 1989 conversation with the judge or his suggestions to the judge regarding reduction of some portions of the jury verdict. Indeed, following Judge Farmer's disqualification at a hearing on August 1, 1989, the respondent voluntarily brought the matter to the attention of the Attorney Grievance Commission in a meeting with the Commission's Deputy Grievance Administrator and he followed it with a letter to the Grievance Commission on August 2, 1989 which opened "This letter is to confirm our personal meeting wherein I advised you that I had an ex-parte conversation with Judge Farmer concerning a case which was pending before him for post-trial motions." (Adm. Exh. 12)

In its report on discipline, the hearing panel wrote:

> "It is the panel's opinion that greater vigilance needs to be paid to Rule 3.5 of the Michigan Rules of Professional Conduct, which prohibits any communication between an attorney and a judge concerning a pending matter. The legal system is designed to be adversarial in nature, where each litigant has an equal opportunity to present evidence and arguments to the fact finder. Public confidence in the system is eroded when a litigant gains access to a Judge about a pending matter, absent the permission of his or her opponent. Such an occurrence is anathema to our profession, since a case should be decided on the merits, and should not be influenced by an ex-parte communication".

It is clear from the panel's report that they fully appreciated the seriousness of the respondent's misconduct. We strongly concur with the well-stated conclusion. No lawyer should operate under the mistaken assumption that an ex-parte communication in violation of MRPC 3.5(B) is a trivial violation of the rules governing the conduct of lawyers.

As our Supreme Court has pointed out, attorney misconduct cases are rarely comparable beyond a limited and superficial extent and such cases must generally stand on their own facts. State Bar Grievance Administrator v DeiRio, 407 Mich 336, 350; 285 NW2d 277 (1979); Matter of Grimes, 414 Mich 483; 326 NW2d 380 (1982) Reference to sanctions meted out for substantially similar misconduct is not without value, however, and we note that the briefs filed by the parties in this review proceeding cite no cases from Michigan or any other jurisdiction regarding the level of discipline imposed as the result of an ex-parte communication. On the issue of discipline, this case is therefore one of first impression in this state. We note, however, that discipline has been imposed in such cases in other states.

In Matter of Riley, 142 AZ 604; 691 P2d 695 (1984), the respondent was found to have committed the following misconduct: 1) Ex-parte communication with a judge; 2) False denial of the ex-parte communication; 3) While a judicial candidate, making derogatory comments about his opponent; and, 4) Making unfair public comments about the decision of a judge. The Court considered the thirty-day suspension imposed by a disciplinary board and ruled that they would affirm the thirty-day suspension of a lawyer for such misconduct but determined that a public censure would be less "disruptive" since the respondent had since become a judge.

In Matter of Gloria Pamm, 118 NJ 550; 573 AT2d 145 (1990), the New Jersey Supreme Court affirmed a public reprimand for an attorney whose misconduct included: 1) Gross negligence; 2) Improper withdrawal from employment; 3) Improper practice of law in another jurisdiction; and, 4) An improper ex-parte communication with a judge.

An attorney's improper ex-parte communication with a judge was considered by the Supreme Court of Oregon in the case of In re Conduct of Bell, 295 OR. 202; 655 P2d 569 (1982) In that case, the 'Court considered the reprimand imposed by a disciplinary review board and increased discipline to a suspension of thirty days noting specifically that the respondent had not been forthright with either the trial court or the court of appeals regarding his interest in the real property which was the subject of the litigation and of the ex-parte communication.

None of the cases cited above contains a detailed discussion of the aggravating or mitigating factors considered by those courts. We note, however, that in Matter of Riley and Matter of Pamm, supra, the ex-parte communication charges were part of broader patterns of misconduct. In the Bell case, the respondent's ex-parte communication was aggravated by his apparent lack of candor to two tribunals, a factor not established in this case.

In reviewing the sufficiency of the discipline imposed by the panel, we have considered the somewhat unique factual situation presented. While it would be anticipated that an attorney engaging in an ex-parte communication with a judge would seek to impart information to the judge clearly advantageous to the attorney or his client, it is undisputed in this case that respondent Miller's suggestion to Judge Farmer was that the jury's verdict in his client's favor was erroneous and should be reduced by $500,000. As the panel properly recognized, the mere fact of an ex-parte communication concerning a pending matter, regardless of the content of the communication, is harmful to the integrity of the judicial process. However, the nature of the communication could have a bearing on the appropriate level of discipline. In this case, respondent Miller has insisted that he was attempting to assist the court by pointing out duplicative awards in the jury's verdict. The Grievance Administrator, on the other hand, has made reference to the possibility of a "hidden agenda" (Brd. Tr. p. 27) and points out that respondent could have been willing to concede an obvious defect in order to protect the remaining 2.2 million dollars in the jury's award.

While both characterizations have some evidentiary support and both are plausible, the fact remains that the respondent's motivation has not been clearly established. Similarly, the judge's failure to disclose the ex-parte communication from April 4, 1989 to August 1, 1989 is another factor which does not constitute mitigation but does contribute to the unique character of the case.

Finally, the panel was entitled to consider the factors presented in aggravation and mitigation. The respondent's previously unblemished record during twenty-four years of practice was cited by the panel in mitigation. The record also discloses that it was the respondent himself who disclosed the ex-parte communication to the Deputy Grievance Administrator of the Attorney Grievance Commission on August 1, 1989. The ABA Standards For Imposing Lawyer Sanctions includes full and free disclosure to a disciplinary board is a factor which may be considered in mitigation. [Standard 9.32(e)]

We are not unmindful of the Grievance Administrator's arguments that the respondent's experience as a trial lawyer could also be considered in aggravation since he would be presumed to know that an ex-parte communication with a judge is clearly inappropriate. It could also be argued that the respondent's voluntary disclosure to the Grievance Commission should be considered in light of the high probability that disclosure would have been made by the judge and/or opposing counsel. Nevertheless, it was the panel members who had the opportunity of weighing these factors in light of their first-hand observation of the character and demeanor of the witnesses who testified before them. The Board has traditionally accorded deference to the panel in matters involving credibility.

While we have characterized this case as one of first impression in Michigan, it should not be inferred that our decision to affirm the reprimand imposed by the panel establishes a standard for the level of

discipline to be imposed in such cases in the future. The Board has reviewed the decision of the hearing panel and has determined that the panel acted appropriately under the circumstances of this case. By declining to rule that protection of the public, the courts and the legal profession can be achieved only by temporarily depriving this respondent of the right to practice law, we do not minimize the seriousness of the misconduct nor should it be inferred that other levels of discipline may not be imposed in future cases involving a violation for this rule.

Concurring: John F. Burns, George E. Bushnell, Jr., Remona A. Green, Hanley M. Gurwin, Linda S. Hotchkiss, M.D.

(Ms. Fieldman did not participate in the discussion or decision of this case. Mr. Zegouras abstained from the vote in this matter)