Grievance Administrator,
State of Michigan
Attorney Grievance Commission,

Petitioner/Appellant,

v

Joseph W Moch, P 23792

Respondent/Cross-Appellant.

ADB 131-89

Decided: May 31, 1995

BOARD OPINION

The Grievance Administrator and the respondent have petitioned the Board for review of the order of discipline issued by Muskegon Hearing Panel #1 on February 16, 1994 suspending the respondent's license to practice law in Michigan for 119 days.[1]

In accordance with MCR 9.118, the parties were ordered to show cause why the hearing panel order should not be affirmed and the hearing was conducted by a sub-board of four Board members. The Attorney Discipline Board has completed its consideration of the whole record, including a transcript of the presentation made to the sub-board and the sub-board's recommendation and concludes that the hearing panel's findings of professional misconduct must be reversed. The formal complaint is therefore dismissed.

The standard of review to be employed by the Attorney Discipline Board is whether the findings of the hearing panel have proper evidentiary support in the whole record. Grievance Administrator v August, 438 Mich 296; 475 NW2d 256 (1991). While the Board reviews the final judgment of a hearing panel for adequate evidentiary support, the Board at the same time possesses

[1] This matter was previously tried by a hearing panel in Ingham County. The Attorney Discipline Board reversed that decision and reassigned this matter for a new hearing before a different hearing panel.

a measure of discretion with regard to its ultimate decision. Grievance Administrator v August, supra at 304; In re Daggs, 411 Mich 304, 318-319; 307 NW2d 66 (1981). The Board does not construe that "measure of discretion" as free license to substitute its collective judgment for that of the hearing panel which heard and weighed all of the evidence. The rule that the panel's findings should be given deference whenever possible is based, in part, upon the recognition that it is the panel which receives evidence in the first instance and has the opportunity to judge the credibility of the witnesses who appear before it. See Matter of David N Walsh, DP 16/83, Brd. Opn. 8/16/94 (Opn. of Brd. p. 333). Neither, however, should the Board shirk from its responsibility to modify a hearing panel's decision when necessary.

Notwithstanding the often contradictory, not to say acrimonious, testimony presented to the panel, most of the factual allegations in Count I of the formal complaint are undisputed. In 1986, the respondent was retained on behalf of Jerome and Pearl Spivey to institute legal proceedings for personal injury sustained by Jerome Spivey in a motorcycle accident. The respondent instituted legal proceedings in the Kent County Circuit Court entitled Jerome Spivey and Pearl Spivey, next friend and Pearl Spivey individually v Javelin Inc, a Michigan corporation [the manufacturer of the motorcycle helmet worn by Spivey at the time of the accident] and Miejer, Inc a Michigan corporation [the retailer from whom Spivey purchased the helmet].

In March 1987, defendant's counsel requested permission to photograph a baseball cap allegedly worn by plaintiff Spivey under his motorcycle helmet at the time of the accident. The respondent authorized opposing counsel to take possession of the hat although respondent was not personally present when the hat was handed over to opposing counsel. When the hat was returned by a messenger from opposing counsel's law firm, the respondent immediately stated that the hat had been clean and with a straight bill when it was tuned over but was in a "noticeably different condition" when it was returned, especially with regard to what appeared to respondent to

be three distinctive creases in the bill. The respondent asserted these claims that the cap had been altered to the circuit court judge to whom the case was assigned. The judge, in turn, ordered evidentiary proceedings which included the respondent's sworn deposition on May 5, 1987. During that deposition, the respondent identified a series of photographs as photographs of the hat allegedly taken prior to its delivery to defense counsel and he identified other photographs of the hat after it was returned to the respondent in an allegedly damaged or altered condition. At the deposition, the respondent recounted his reaction when the hat was returned to his office and his insistence that the hat was in a "noticeably different condition" than when released.

The only allegation in Count I of the complaint which is seriously disputed by the respondent is that his testimony at the deposition "was false and was known by respondent to be have been false at the time it was given and was given by respondent for the purpose of deceiving or misrepresenting the facts alleged".

Similarly, the respondent admitted the allegations in Count II that he filed a Request for Investigation on May 9, 1988 regarding the conduct of defense counsel Stephen P Afendoulis in which he stated:

> i) In March 1987, defendants' counsel, Mr Afendoulis requested that he be allowed to take possession of the hat for photographic purposes. The hat was delivered to Mr Afendoulis in the same condition that it appeared as presented to the Law Offices of Joseph William Moch, by the Grand Rapids Police Department, i.e., in an as-new, uncreased condition. The hat was surrendered to Mr Afendoulis on March 31, 1987 under the belief that the hat was to be returned that same day. However, as a precautionary measure, the hat was photographed by plaintiff's attorney prior to releasing the hat to Mr Afendoulis.
>
> On April 7, 1987, the hat was returned to the law offices of Joseph William Moch in a somewhat dirty, crushed and noticeably creased condition.

Respondent Moch denied the charge in Count II that he knowingly and willfully made serious charges of professional misconduct against another attorney when he knew or should have known that those statements were false.

The hearing panel's report with regard to the charges of misconduct concluded:

> After hearing all the testimony; after carefully examining all of the exhibits; and after having deliberated, the undersigned find that petitioner has established, by a preponderance of the evidence, that Joseph W Moch is guilty of the professional misconduct as alleged in the formal complaint. In reaching these conclusions, respondent's testimony was not found to be entirely credible. The testimony of [complainant] Stephen P Afendoulis is accepted as substantially credible. (Hrg. Pnl. Rept. 12/6/93, p. 2).

Further insight into the hearing panel's conclusion is found in the mitigating factors listed by the panel in its report on discipline issued February 15, 1994. There, the panel reported that the factors it had considered in mitigation included:

> 1) "misconduct not established beyond a reasonable doubt nor by clear and convincing evidence";
>
> 2) "misconduct established by a bare preponderance of the evidence '("fifty percent plus a feather')".

Indeed, the hearing panel's decision to impose a suspension of 119 days (a suspension which may be terminated automatically with the filing of affidavit and which does not require a further examination of respondent's character or fitness) suggests a level of ambivalence in the panel's attitude toward its findings of misconduct. Notwithstanding the respondent's prior unblemished record, a finding that an attorney deliberately lied under oath in a judicial proceeding, compounded by the making of deliberately false statements in an answer to a Request for Investigation, could reasonably be expected to result in substantially greater discipline.

Although Michigan is in the clear minority of jurisdictions which employ a preponderance of the evidence standard in attorney

discipline proceedings rather than the more widely used standard of "clear and convincing" evidence, we emphasize that we do not question the validity of the preponderance standard established in MCR 9.115(J)(3). That is the standard employed in reviewing the panel's findings in this case. However, when an attorney's otherwise unblemished professional reputation is to be weighed in a balance which may be tipped by (to use the panel's phrase) "the weight of a feather", it is incumbent upon us to scrutinize the evidence in the record with great care. We have applied such scrutiny in this case.

Both parties have argued that this case ultimately turns upon a finding as to the credibility of respondent Moch and complainant Afendoulis. As noted above, the panel reported that the respondent's testimony was not found to be "entirely credible" while the complainant's testimony was accepted by the panel as "substantially credible."

Based upon our review of the whole record, we do not necessarily disagree with the hearing panel's conclusions as to credibility. However, we do not agree that resolution of credibility issues in favor of the complainant must necessarily lead to a finding of misconduct as charged in the complaint. It is undisputed that the hat was returned from the complainant's law firm to the respondent in a somewhat worn condition and with a creased bill. Conflicting testimony was offered as to the condition of the hat at various times before it was turned over to complainant's law firm. There is also conflicting testimony in the record, based upon minute inspection of various photographs, as to whether the same hat appears in those photographs and the significance, if any, of the processing numbers which appear on those photos. Obscured amidst the testimony regarding the photographs or condition of the cap at various times is the crucial issue of whether respondent's testimony on May 5, 1987 regarding certain photographs and the condition of the hat was not only false but was <u>known</u> to have been false and whether or not it was given "for the purpose of deceiving or misrepresenting the facts

alleged". With regard to Count I, we conclude that the record lacks adequate evidentiary support for a finding that the respondent's testimony under oath at a deposition on May 5, 1987 was known by him to be false at the time it was given.

We reach the same conclusion with regard to Count II, that is, that there is insufficient evidence in the record to establish the element of intent necessary to sustain the charge that the respondent knowingly and willfully made false charges of professional misconduct against another attorney in a Request for Investigation.

In the absence of the proper level of evidentiary support of those charges of making false statements at the deposition and in a Request for Investigation, the formal complaint must be dismissed.

Board Members C Beth DunCombe, Elaine Fieldman, Marie Farrell-Donaldson, Barbara B Gattorn, Albert L Holtz and Miles A Hurwitz concur in this opinion.

Board Members John F Burns and George E Bushnell, Jr, were recused.

Board Member Paul D Newman did not participate.