Grievance Administrator,
State of Michigan
Attorney Grievance Commission,

Petitioner/Appellee,

v

Benjamin W. Dajos, Jr., P 12448,

Respondent/Appellant.

Case No. 92-54-GA

Issued: February 26, 1993

BOARD OPINION

The respondent was reprimanded by a hearing panel which concluded that the respondent's failure to seek an adjournment and his failure to file a notice of alibi defense while acting as appointed counsel for a defendant in a criminal matter constituted acts of professional misconduct warranting discipline.

Based upon a review of the whole record, we find insufficient evidentiary support for the panel's conclusion that the respondent's exercise of professional judgment constituted misconduct warranting public discipline. The Order of Reprimand is therefore vacated and the complaint is dismissed.

The complaint filed March 11, 1992 is based upon the respondent's conduct as appointed counsel in a criminal proceeding in Branch County Circuit Court. Respondent was appointed to represent a defendant charged with engaging in criminal sexual conduct with his eight-year-old daughter.

The Request for Investigation filed to the client alleged that the respondent 1) should have asked for an adjournment of the criminal trial; and, 2) was not cooperating fully with the attorney handling the appeal of the client's conviction. In his answer to the Request for Investigation, the respondent asserted that the complainant was convicted, in part, because certain witnesses were excluded by the trial judge on the grounds that the witnesses were offered to provide an alibi and that there had been no notice of alibi defense.

A proposed letter of admonition was sent to the respondent in December 1991 by the Attorney grievance Commission containing an admonition for the respondent's failure to file a notice of alibi defense and for his failure to file a motion concerning the victim's prior sexual conduct (the so-called rape-shield law). Upon the respondent's refusal to consent to an admonition, the matter was again considered by the Grievance Commission in accordance with MCR 9.106(6). A formal complaint was then filed against the respondent which included the two allegations in the proposed admonition together with further charges that the respondent failed to ask for an adjournment to prepare for trial and that he failed to cooperate with appellate counsel.

The panel denied the respondent's motion to quash the two allegations of misconduct which did not appear in the letter of admonition. The evidence presented by the Grievance Administrator consisted of the testimony of the respondent, the testimony

of the complainant and introduction of the complete record of the Circuit Court proceedings. The respondent offered his own further testimony in his defense.

The panel ruled that there was not sufficient evidence to support a finding of misconduct on the charges that the respondent had a duty to submit notice of a defense based upon the victim's prior sexual conduct or that the respondent failed to communicate with appellate counsel.

The respondent seeks review of the hearing panel's conclusion that professional misconduct was established with regard to 1) failure to provide notice of an alibi defense; and, 2) failure to seek an adjournment in order to prepare properly for the trial.

We first consider the respondent's claim that the Grievance Administrator's proposed letter of admonition fixed the scope of these proceedings and that no further charges could be added. We find nothing in the applicable court rules or prior opinions of the Board or the Supreme Court in support of that position.

The circumstances under which an admonition may be given are described in MCR 9.106(6). If the respondent objects to the admonition, it must be vacated and the Attorney Grievance Commission must then decide whether to dismiss the Request for Investigation or authorize the filing of a complaint.

In some respects, the Commission's proposed letter of admonition is a conditional offer not unlike an offer of settlement in a civil case or a proffered plea agreement in a criminal case. If the admonition is not accepted in the form offered, the Grievance Administrator is not necessarily limited by the contents of the proposed admonition. The allegations in this formal complaint were all related to the "matter under investigation". Once the complaint was filed, the respondent was placed on notice of the charges which he was expected to defend.

The Board has reviewed the panel's decision and the panel proceedings for proper evidentiary support on the whole record. In re: Freedman, 406 Mich 256; 277 NW2d 635 (1979); In re: Grimes, 404 Mich 483; 326 NW2d 380 (1982); Grievance Administrator v August, 438 Mich 296; 475 NW2d 256 (1991). There is no challenge to the panel's factual findings. The respondent admits that following his appointment in a criminal case he neither sought an adjournment or the impending trial nor sought to file a notice of alibi defense. Rather, the respondent challenges the panel's determination that these acts constituted professional misconduct in these circumstances.

The Supreme Court has ruled that while the Board reviews a panel's judgment for adequate evidentiary support, the Board at the same time possesses a measure of discretion with regard to its ultimate decision. Matter of August, supra at 304. The ultimate decision in this case is whether this attorney's exercise of professional judgment under these facts and circumstances should result in disciplinary sanctions.

It is alleged that, following his appointment as attorney for a criminal defendant, respondent's failure to seek an adjournment of the impending trial constituted professional misconduct. The circuit order appointing the respondent to defend the case is dated November 8, 1990. When that order was signed by the circuit court judge, the trial was scheduled to proceed on November 15, 1990. There is no evidence in the record which suggests that the judge who appointed the respondent and presided over the trial considered that the defendant's rights were in jeopardy. More importantly, the Grievance Administrator has conceded that the respondent had consulted with his client as early as August, 1990. (Tr. p. 96) It is clear from the record that the respondent had met with the

defendant and had begun actual trial preparation prior to the date of his formal appointment by the court.

The record is also clear that a trial on the criminal charges against the respondent's client had actually been commenced more than a year earlier when the defendant was represented by another attorney. That trial ended in a mistrial. The respondent's exhibits in this case include the list of potential witnesses prepared by his client in March 1989 and given to the first attorney in preparation for the first trial. This material was available to the respondent and he contends that his trial preparation took into account the services provided to his client by two other attorneys.

These factors have been considered by the Board. It is the respondent's position that he did not seek an adjournment of the November 15, 1990 trial because, in his considered judgment, he was sufficiently acquainted with the available evidence and the potential witnesses to present a defense on behalf of his appointed client. We do not find evidentiary support in the record for a conclusion that the three months between the respondent's consultation with the client in August 1990 and the scheduled trial date in November 1990 was clearly insufficient time to prepare for trial as a matter of law or as a matter of fact.

We reach the same result with regard to the charge that the respondent should be professionally disciplined for his failure to file a notice of alibi defense under the provisions of MCR 768.20.

The respondent was the third attorney to represent the defendant against the charge of criminal sexual conduct. The first attorney appointed to represent the defendant when the matter was bound over from district court in February 1989 withdrew after the circuit court trial ended in a mistrial in October 1989. That attorney was later reappointed and withdrew again because of a conflict of interest.

The second appointed attorney, a public defender, withdrew in August 1990 and the criminal trial was scheduled for November 15, 1990. When the respondent was appointed on November 8, 1990, no notice of alibi defense had been filed by either of the two preceding attorneys during the twenty-one months which had elapsed since the case was bound over from district court.

The evidence does not support a conclusion that the respondent neglected to file a notice of alibi defense where a valid alibi defense was available. The respondent consistently maintained that in his professional judgment the proffered testimony was not alibi testimony and thus the notice was not required. There is no evidence that the respondent was aware of potential witnesses who would testify that the defendant was somewhere other than the scene of the crime at the time the crime was committed. Review of the transcript of the criminal proceedings (Exhibit 2) sets forth at some length the respondent's vigorous argument that the proffered witnesses would testify as to who was with the defendant on a certain day, not where he was at the time the crime was committed.

The trial judge ruled that the proffered testimony was "alibi testimony". The Grievance Administrator conceded that the trial judge's ruling did not, in and of itself, cement the issue of misconduct. Instead, it is the Administrator's position that the respondent's failure to file a notice of alibi defense fell below a recognizable minimum level of competence which would constitute professional misconduct even if the trial court had allowed the disputed testimony or the trial court's ruling was ultimately reversed on appeal.

The Grievance Administrator has no evidence to support this conclusion.[1]

The evidence in this case is not adequate to support a finding that the respondent's exercise of his professional judgement as to the existence of an alibi defense violated the provisions of Michigan Court Rules 9.104(3 and 4) or the Michigan Rules of Professional Conduct, MRPC 1.1(b); 1.2(a); or 1.3.

[1]We do not reach the question of whether in some circumstances professional negligence, i.e. malpractice, could also be misconduct under the applicable disciplinary rules. This is not such a case. If we were to accept the Grievance Administrator's argument that respondent's conduct was so far below a recognized standard of competence, we would in effect be stating that the client had ineffective assistance of counsel.