GRIEVANCE ADMINISTRATOR,
Petitioner/Cross-Appellant,

v

JAMES J. ZIMMER, P-22732,
Respondent/Appellant.

ADB 30-88

Decided: October 19, 1990

BOARD OPINION

The two-count complaint filed by the Grievance Administrator charged that the respondent committed professional misconduct by engaging in a single transaction involving the sale of four ounces of cocaine in October 1981 and by giving a false answer to a question posed to him before a federal grand jury in April 1987. In his answer, the respondent admitted the factual allegations in the complaint, denied the specific charges of professional misconduct, and asserted his eligibility for an order of probation based upon his substance abuse at the time of the acts alleged.

The hearing panel concluded that misconduct had been established and conducted a separate hearing on discipline in accordance with MCR 9.115(J)(2). The panel's order of discipline directed that the respondent's license to practice be suspended for 119 days, that he attend Alcoholics Anonymous no less than three times per week during the period of his suspension, and that his practice of law for the next two years after his suspension be subject to the terms of a probation order, including quarterly reports from a supervising attorney.

The respondent has filed a petition for review seeking elimination of the 119-day suspension on the grounds that it is unduly punitive. The Grievance Administrator's cross-petition for review, claiming that the discipline imposed by the hearing panel was insufficient, was voluntarily withdrawn. The Attorney Discipline Board has considered the whole record in this case together with the arguments presented by the parties and has concluded that the hearing panel's order of discipline should be modified. The goals of discipline may be achieved in this case by increasing the suspension to a period of 120 days and by directing that the suspension be stayed pending Mr. Zimmer's successful completion of a two-year probation under the conditions outlined by the hearing panel.

The respondent's admitted problems of substance abuse are set forth in some detail in the record below. He testified he was introduced to cocaine in 1978 and by 1981 had become a regular user. His cocaine use continued until 1983 but was replaced by the heavy use of alcohol from 1983 to 1987.

In answer to the complaint and in his testimony to the panel, the respondent has never denied the charges that he sold four ounces of cocaine in 1981. The respondent told the panel:

> Well, I was heavily in debt from all the cocaine I was doing in 1981, and in October of '81, I approached Mark to make a deal so that I could make some money . . . it was to buy--to get money to buy cocaine. (Tr. 13)

On April 29, 1987, the respondent gave sworn testimony to a federal grand jury under an order granting partial immunity. It is not alleged that he was untruthful in his answer to questions regarding his purchase of drugs from various individuals under investigation by the government. He concedes, however, that he answered "no" when asked if he had ever sold cocaine and that his answer was not truthful. Re went on to explain that the next day at approximately 8:00 a.m. he telephoned the U.S. attorney and offered to correct his testimony. The record discloses that he was recalled and gave further testimony to the grand jury.

The Board has considered the respondent's first argument that the hearing panel erroneously ruled that the allegations of Count II (based upon the false testimony to a grand jury), were not established by the proofs. In its findings of fact, the hearing panel concluded that the respondent "testified falsely before the grand jury" and they concluded that his participation in a drug sale and his offer of false testimony constituted violations of MCR 9.104(1-5). In determining the adequacy of the charges against an attorney in disciplinary proceedings, the precise wording of the complaint need not have been exemplary if the complaint effectively informed the respondent of the charges against him and did not prejudice his opportunity to adequately defend himself. Matter of Crane, 400 Mich 484; 255 NW2d 624 (1977). Given the facts of this case, we do not believe any miscarriage of justice occurred where the respondent has, at all times, admitted giving false testimony.

A more difficult question is presented by the respondent's challenge to the discipline imposed. In his responsive pleadings, the respondent raised his substance abuse and subsequent rehabilitation in mitigation and asserted his eligibility for an order of probation in accordance with MCR 9.121(C). Although the hearing panel's report does not include a specific finding that the respondent established the criteria set forth in that sub-rule, there is ample evidentiary support in the record for the conclusion that Mr. Zimmer's ability to practice law competently was materially impaired by drug or alcohol addiction during the period 1981 through 1987; that the impairment substantially contributed to his misconduct; that the cause of the impairment is susceptible to treatment; and that the respondent in good faith intends to continue the treatment which he has undertaken. In these review proceedings, neither party objects to the terms of probation imposed by the panel.

We are left, therefore, with the related issues raised by the respondent--whether, as a general rule, the Court Rules allow the imposition of discipline which combines both a suspension from the practice of law and a period of probation; and, if so, whether such an order is appropriate under the circumstances in this case.

The Board has previously ruled that a term of probation may be combined in a single order with another form of discipline described in MCR 9.106. In Matter of Carol A. Dean, DP 142/84 (Brd. Opn. 9/30/86), for example, the Board declined to adopt the respondent's view that a hearing panel was forced to choose between an order of reprimand and an order of probation and could not combine both sanctions in a single order of discipline.

In Matter of Hugh J. McGuire, DP 146/81, (Brd. Opn. p. 268, 5/13183) the Board vacated a hearing panel order of revocation and issued an order combining a fourteen-month suspension with a two-year period of probation. We recognize that in McGuire, the respondent had actually been suspended from the practice of law for approximately fourteen months when the Board's final order was issued and the suspension was, in effect, imposed with credit for time served. Nevertheless, the Board's ruling in that case is instructive. In McGuire, the panel entered an order of revocation based upon the

respondent's admitted conversion of client funds. After entry of that order, his counsel requested that the matter be remanded to a master to offer mitigating testimony regarding his impairment at the time of the misconduct as the result of his alcoholism. Based upon the master's report, the Board concluded that the respondent had established his eligibility for an order of probation. In its opinion, the Board noted that the decision to grant probation is a discretionary one but that:

> A significant degree of public protection has been afforded by the suspension that has been in effect for over fourteen months. Based on the record before us we feel that rehabilitation and readmission under significant conditions ultimately does more to advance the protection of the public then continuation of the disbarment.
>
> Although a substantial term of suspension might be an appropriate adjunct to probation, respondent has been suspended, as indicated, for a substantial period of time, providing some measure of assurance of a positive prognosis for self-improvement.

Matter of Hugh J. McGuire, supra. (Brd. Opn. p. 270)

The record in this case discloses that the respondent last used cocaine in 1983 and, by his testimony, last consumed alcohol in August 1987. We believe that Mr. Zimmer's continued recovery for a period of more than three years provides a measure of assurance of a positive prognosis even greater than the one year of sobriety relied upon by the Board in McGuire.

The Supreme Court has made it clear, in MCR 9.105, that the primary focus of the Board and its panels in fashioning orders of discipline is to insure the protection of the public, the courts and~the legal profession. The Court has also made it clear that while discipline for misconduct is not intended as punishment for wrongdoing, the primary goal may at times best be achieved by the deterrent effect of punishment. "We do not accept the assertion that 'protection' and 'punishment' are irreconcilable concepts and that the line between them cannot be crossed . . ." Matter of Grimes, 414 Mich 440; 326 NW2d 380 (1982).

It does not follow, however, that protection of the public can only be accomplished through punishment or that the line between protection and punishment has been eliminated by the Court's opinion in Grimes.

In our review of the discipline imposed in this case, we have considered the time which has elapsed since the acts of misconduct in 1981 and 1987, the respondent's otherwise unblemished record, and the respondent's apparent sobriety since 1987. We believe that the provision suspending the respondent's license to practice law would be effective as a deterrent to assist Mr. Zimmer in his recovery but would otherwise be unduly punitive. We also believe that in the event Mr. Zimmer fails to comply with the terms of probation and is subject to an order of suspension, that suspension should continue until he has affirmatively established his eligibility to return to the practice of law by a petition for reinstatement and the proceedings outlined by MCR 9.123(B) and MCR 9.124.

The panel's order is modified by increasing the period of suspension to 120 days and ordering that the suspension be stayed pending the respondent's successful

completion of the two-year probation period ordered by the panel. Compliance with the order of probation will result in a final order vacating the order of suspension.

John F. Burns, Remona A. Green, Hanley M. Gurwin, Linda S. Hotchkiss, M.D., and Theodore P. Zegouras

CONCURRING OPINION

By Robert S. Harrison

I join in the decision to modify the discipline in this case by staying the respondent's suspension from the practice of law provided he faithfully complies with the terms of probation. I disagree only with the decision to increase the potential suspension to 120 days. I am not persuaded that a suspension of 119 days would be inappropriate under the specific facts of this case. Obviously, the sale of an illegal drug and giving false testimony are extremely serious acts of misconduct. It should be emphasized in this case, however, that the single drug transaction was made while the respondent was himself seriously addicted to cocaine and was completed approximately seven years before these disciplinary proceedings were instituted.

With regard to the false answer before the grand jury, both parties recognize the mitigating effect of the respondent's telephone call to the office of the U.S. attorney at 8:00 a.m. the following morning to correct his testimony. I would hope that the Board's decision in this case is not interpreted as a clear-cut precedent for the imposition of a minimum suspension of 120 days where an attorney's misrepresentation is accompanied by immediate and voluntary disclosure.