Grievance Administrator,
Petitioner/Appellant,
v
William Fischel, P-22866,
Respondent/Cross-Appellant.

ADB 227-87

Decided: March 13, 1989

BOARD OPINION

The respondent was reprimanded by a hearing panel which concluded that the respondent made a misrepresentation to a hearing panel, to wit, that a doctor's affidavit submitted in support of a motion to set aside default had been signed in the presence of a notary. Separate petitions for review have been filed by the Grievance Administrator and the respondent. The Grievance Administrator urges that misrepresentation by an attorney to a tribunal warrants discipline greater than a reprimand. Respondent seeks dismissal of the action on the grounds that 1) misrepresentation which is not "material" is not misconduct, 2) a reprimand is too harsh, and 3) the court rule which directs that a separate hearing be held on discipline, MCR 9.115(J)(2), is unconstitutional. Based upon our review of the record and the arguments of the parties, we are not persuaded that the hearing panel Order of Reprimand was entered erroneously or that the level of discipline is inappropriate. The hearing panel's order is affirmed.

In a previous disciplinary matter which ended in the dismissal of the complaint, the respondent was defaulted for failure to answer the formal complaint. In a hearing before an Oakland County Hearing Panel on November 6, 1986 in connection with his motion to set aside the default, the respondent presented to the panel an affidavit from a physician, purportedly signed and notarized on the date of the hearing,which stated that the respondent had been treated for depression.

The respondent was called to the stand and was sworn. He testified that the affidavit was signed by the doctor in the presence of a notary and that the affidavit was relevant and material to the motion to set aside the default. In later testimony by the doctor, it was discovered that the affidavit was not signed in the presence of a notary. Respondent later admitted that, contrary to his own sworn testimony, the notary was not present when the affidavit was signed.

The respondent states his position with regard to the nature of the misrepresentation found by the hearing panel:

> In the instant case, there is no showing of an intent to deceive. Fischel was merely pressed for time, confused as to his responsibility,

> and took a short-cut and then told an untruth about it. Untruth--yes, but to a non-material, inconsequential fact upon which no one relied.

We are unable to find sufficient support in the court rules or case law for respondent's argument that a misrepresentation does not constitute misconduct unless it is a "material misrepresentation". The disciplinary rule under which respondent was charged, Canon 1--DR 1-102(A)(4) directs that a lawyer shall not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." (emphasis added) We conclude that, at most, the phrase "material misrepresentation" has been used by hearing panels, the Board or the Supreme Court as a way of emphasizing the seriousness of particular deception but that it is not a necessary element in order to establish misconduct.

In Matter of Jonathan Miller, (Brd. Opn. p. 303, 1984), a case cited by the respondent, the Board issued a reprimand to an attorney who had misrepresented the status of an estate. The Board stated that the misrepresentation in that case was made to put an anxious client at ease and was not made to conceal improper or negligent conduct. In its opinion, the Board characterized the misrepresentation as "marginal". Nevertheless, the Board found that misconduct was established.

> He may have considered his inaccurate characterizations and communications to be insignificant--and therein lies the danger. Indeed, in communicating with clients and disciplinary agencies, more than mere accuracy is required.

An attorney has a duty to tell the truth when giving sworn testimony to a tribunal. Our legal system depends in large part upon an assumption that lawyers, as officers of the court, are telling the truth about the documents which they present to the court, their clients, and other lawyers. We cannot accept the argument that the respondent, when sworn to tell the truth to the panel, had a duty to tell the truth only as to those matters which, in his opinion, were "material".

The respondent acknowledges that a separate hearing was held on the issue of discipline, as mandated by MCR 9.115(J)(2). He argues, however, that the court rule is unconstitutional in that it deprives the hearing panel of discretion in imposing a sanction. Specifically, respondent argues that attorneys found to have committed serious misconduct when would otherwise warrant suspension have an opportunity at the discipline hearing to introduce sufficient mitigating evidence to justify the imposition of a reprimand. Respondent apparently argues that his misconduct was of such a technical nature that the panel, as a matter of law, was required to impose the least form of discipline, a reprimand. This, he argues, amounted to a denial of equal protection since he

could not seek or obtain a lesser form of discipline, no matter how much mitigation he was able to present.

This argument is flawed in several ways. First, it is based upon the assumption that the discipline in this case could not, under any circumstances, result in more than a reprimand. We are aware of no provision in the court rules, the opinions of this Board or the opinions of the Michigan Supreme Court which support the proposition that a certain level of discipline must, as a matter of law, be imposed for specific types of discipline. On the contrary, discipline must be imposed in each case based upon the unique circumstances presented, including the nature of the misconduct and the specific mitigating or aggravating factors. Furthermore, the argument rests on the assumption that the only purpose of the sanction hearing is to give the respondent an opportunity to submit mitigating evidence. In fact, the appropriate discipline in every case must be weighed in light of mitigating and aggravating factors.

The respondent was found to have given false testimony under oath. We do not accept the argument that the misconduct in this case was merely "technical" or that a reprimand was a foregone conclusion. Had evidence of aggravating factors been received, (prior discipline or a wide-spread pattern of similar conduct, for example), a lengthy suspension might well have been imposed.

Finally, we consider the appropriateness of the discipline itself. While we agree with the hearing panel's conclusion that respondent's misconduct was a "serious offense", we also agree that there were mitigating factors including the respondent's prior unblemished record and the incidental nature of the false statement. Misconduct having been established, a reprimand was the least form of discipline which could be imposed in accordance with MCR 9.106. The reprimand is affirmed.

All concur.