IN THE MATTER OF DONALD A. TURNER,
Respondent,
A Member of the State Bar of Michigan,
File No. DP-134/81

Argued: March 30, 1983
Decided: July 18, 1983

OPINION OF THE BOARD

Respondent pled guilty to Misprision of a Felony. The hearing panel entered an order of suspension for 121 days. Both the Grievance Administrator and the Respondent appealed the level of discipline imposed. The Grievance Administrator contends further that the scope of proofs was limited improperly. We affirm the hearing panel findings regarding the permissible scope of evidence and the level of discipline imposed.

On October 21, 1981, Respondent pled guilty in the U. S. District Court for the Eastern District of Michigan to Misprision of a Felony, in violation of 18 USC Sec. 4. Misprision of a Felony is defined as:

> The offense of concealing the felony of another, but without such previous concert with or subsequent assistance to the felon as would make the party concealing an accessory before or after the fact." Black's Law Dictionary, 4th Ed Revised, 973.

A Formal Complaint was filed by the Grievance Administrator alleging misconduct to-wit: a violation of GCR 1963, 953(5) which defines conduct violating a state or federal criminal law as professional misconduct and grounds for discipline. The Respondent admitted the conviction in his Answer to the Formal Complaint. At the hearing, the panel ruled that evidence of the circumstances surrounding the conviction would not be admitted because Respondent's admission made such proof unnecessary for purposes of adjudicating the Formal Complaint and inadmissible because of the limited language of the allegations in the Formal Complaint. There was no controversy between the parties about the fact or validity of the conviction.

In mitigation, the Respondent offered expert testimony attempting to show that the criminal offense in question was not a serious offense despite its classification as a felony. In rebuttal, the Grievance Administrator was limited by the hearing panel to similar expert testimony and was prevented from offering into evidence the underlying facts regarding the conviction.

Two issues are presented to the Board on appeal. The first involves the level of discipline which was imposed. We believe that the 121 day suspension is appropriate. The nature of the felony conviction in this case, based on the record before Us, does not merit revocation or a longer suspension, nor is there any indication that the hearing panel erred or abused its discretion in assessing this degree of discipline. The facts which are available warrant hearing panel proceedings prior to reinstatement in the interest of protecting the public and the profession. Respondent will

have to show by clear and convincing evidence that he is fit to be recommended to the public as a member of the legal profession.

The second issue in this case is perhaps more difficult. The hearing panel concluded that, in light of the limited language in the Formal Complaint and Respondent's admission of the validity of the conviction, no proofs were necessary regarding the facts and circumstances underlying the misprision charge. This conclusion is consistent with GCR 1963, 111. There was no reason to allow an expansion or addition of proofs because the only alleged misconduct - the conviction - was uncontested, thereby obviating the need for foundational evidence.

The Formal Complaint merely alleged that there was a felony conviction and cited the title of the criminal statute. Respondent was, of course, entitled to notice of the specific legal and factual allegations which the Grievance Administrator would attempt to prove or address, and Respondent would have to defend, at the hearing. State Bar Grievance Administrator v Jackson, 390 Mich 147, 211 NW2d 38 (1973), State Bar Grievance Administrator v Fried, 388 Mich 711, 202 NW2d 692 (1972).

The Respondent attempted to mitigate the misconduct by offering expert testimony about the legal nature and severity of the charge for which he was convicted. The Grievance Administrator's rebuttal was properly limited to similar expert testimony relevant only to the legal nature and seriousness of the felony charged (which was cited without elaboration in the Formal Complaint). The Respondent's expert was questioned about and testified only in regard to the definition, officially-perceived severity and plea-bargaining usefulness of the felony statute. The facts giving rise to Respondent's knowledge and concealment of the felony offense are not in the record of the hearing panel proceedings. Indeed, the criminal transaction does not seem to have been included in the available federal court record. The Grievance Administrator argues on review here that the door of his rebuttal to the mitigation testimony was opened sufficiently to allow any additional proofs bearing upon the factual (as well as legal) nature of the offense. We do not agree.

The panel was correct in noting that the mitigation evidence was carefully limited by Respondent in an attempt to advise the panel regarding the attitude of the federal authorities toward the reduced charge and the guilty plea thereto. The Respondent made no attempt to mitigate discipline by minimizing any type of criminal activity; indeed, he did not mention the criminal transaction or his possible relationship(s) to the principals thereof. Therefore, the Grievance Administrator's rebuttal evidence in this case was properly limited by the distinguished hearing panel to the matters specifically alleged in the pleadings.

We affirm the hearing panel conclusion that a suspension of 121 days with reinstatement proceedings will adequately protect the public in this case.

Board Secretary David Baker Lewis did not participate in the hearing or decision in this matter.

Board Member Leo A. Farhat Dissenting:

I respectfully dissent from the Board's decision. The limited language of the allegations in the Formal Complaint confined the initial parameters of proof. However, once the Respondent offered any mitigation evidence, the Grievance Administrator should have been allowed the opportunity to make his rebuttal to the extent necessary to refute the mitigation which Respondent offered. The Grievance Administrator's rebuttal could have properly included facts underlying or relating to the conviction simply because they may have demonstrated to some degree that the crime was de jure or de facto, more serious than Respondent had claimed by way of his mitigation testimony.

It was the Respondent who raised the issue of the seriousness of the misconduct; certainly, in the interest of public protection and to arrive at an intelligent, informed decision on the disciplinary sanction, we should allow any rebuttal by the Grievance Administrator touching upon the underlying facts which would reveal the essence of the matter. While such evidence might tend to be cumulative, superfluous or irrelevant on the question of whether a discipline rule has been violated, it certainly cannot be so characterized with regard to formulating appropriate discipline. It is contrary to the intent and purpose of the discipline standards and rules to limit such evidence once the issue of mitigation has been opened.

Chapter 95 of the Michigan General Court Rules devoted to discipline proceedings opens (after definitions) with this mandate contained in GCR 1963, 951.1:

> "Chapter 95 is to be liberally construed for the protection of the public, the courts and the legal profession . . ."

Excluding evidence bearing directly upon Respondent's character by use of a technicality of questionable validity has deprived the panel and the Board of information vital to meaningful assessment of an appropriate discipline. Attorney disciplinary proceedings are quasi-criminal in nature, State Bar v Woll, 387 Mich 154, 194 NW2d 835 (1972) and by analogy, information about the underlying transaction and specifics regarding Respondent's role would come to the attention of a sentencing judge via a pre-sentence report in a criminal case. The criminal penalty and the motives of the U.S. Attorney are not nearly so relevant in the disciplinary forum as are the underlying facts bearing upon the Respondent's true character and the justification which may ultimately be required prior to holding this individual out to the public as an individual who is fit to be entrusted with professional and judicial matters and to aid in the administration of justice as an attorney and counselor and as an officer of the court. GCR 1963, 952.1 and 972.2(7).

I submit that the decision of my colleagues in the majority is an exaltation of form over substance. Respondent should be not be permitted to open the "door of rebuttal" just wide enough to allow the passage of self-serving evidence intended to minimize the significance of a felony conviction. Perhaps the discipline imposed is adequate; we have no reasonable assurance of this, however, until the truth of the entire matter is adequately examined. I would reverse and remand to the panel to allow further proceedings and an opportunity for the Grievance Administrator to submit proof bearing upon the facts and circumstances surrounding the misprisoned felony.