STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellee/Cross-Appellant,

v

Steven G. Cohen, P 48895,

Respondent/Appellant/Cross-Appellee,

Case No. 15-28-GA

Decided: April 20, 2018

Appearances:

Robert E. Edick, for the Grievance Administrator, Petitioner/Appellee/Cross-Appellant
Steven G. Cohen, Respondent/Appellant/Cross-Appellee, In Pro Per

BOARD OPINION

Tri-County Hearing Panel #1 issued an order on May 4, 2017, suspending respondent Steven G. Cohen's license to practice law in Michigan for 180 days. Respondent filed a petition for review seeking to have the hearing panel's findings of misconduct vacated, or if affirmed, seeking a reduction in the discipline imposed. The Grievance Administrator filed a cross-petition seeking an increase in the discipline imposed. The Attorney Discipline Board has conducted review proceedings in accordance with MCR 9.118, including review of the record before the hearing panel and consideration of the briefs and arguments presented to the Board at a public review hearing. For the reasons discussed below, we affirm the hearing panel's findings of misconduct, decline to increase the discipline imposed by the hearing panel, and instead, reduce the discipline imposed from a 180-day suspension to a reprimand.

I. Hearing Panel Proceedings

On March 24, 2015, the Grievance Administrator filed a two-count formal complaint against respondent that involved his representation of interested parties in two separate probate cases relating

to the Don H. Barden Trust (Count One) and the Rosa Parks Trust (Count Two). Both counts alleged that respondent filed vexatious pleadings that contained uncorroborated allegations and defamatory statements about the judges assigned to each probate matter. Count Two further alleged that after his motion to set aside a judgment for administrative costs that was entered against his clients was denied, respondent deliberately filed a pleading titled "Petition Concerning Conspiracy and Breach of Duty," (conspiracy petition) to force the disqualification of Wayne County Probate Court Judge Freddie G. Burton, Jr., who was assigned to that matter. In fact, shortly thereafter, respondent filed a motion to disqualify Judge Burton which contained, as the predominate reason for disqualification, the fact that Judge Burton could not act as the presiding judge in a matter in which he was named as a party.

The formal complaint further alleged that despite being notified that the conspiracy petition was being held in abeyance pending a decision on the motion to disqualify Judge Burton, respondent attempted to file a proposed default judgment, a subpoena for the deposition of Judge Burton and interrogatories related to the conspiracy petition. Judge Burton ultimately denied the motion to disqualify and dismissed the conspiracy petition. Together with two other orders, respondent appealed the order dismissing the conspiracy petition to the Michigan Court of Appeals. The matters were consolidated by the Court of Appeals. On February 20, 2014, the Court of Appeals issued an opinion that affirmed Judge Burton's rulings in all three orders, and specifically determined that respondent's appeals were vexatious. The formal complaint noted that pursuant to MCL 600.2106,[1] the February 20, 2014 opinion was *prima facie* evidence of all facts recited therein. (¶ 43.)

The substance of the pleadings in question, as referenced in both counts, was fully set forth in the factual paragraphs of the formal complaint, (¶¶ 9, 13, 15, 16, 19, 28-31), and complete copies of the referenced pleadings and orders were also attached to the complaint. Both counts charged violations of MRPC 3.1; 3.2; 3.5(d); 8.4(c); and, MCR 2.114(D)(3); 5.114(A)(1); and 9.104(1), (2) and (4).

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[1] Sec. 2106. A copy of any order, judgment or decree, of any court of record in this state, duly authenticated by the certificate of the judge, clerk or register of such court, under the seal thereof, shall be admissible in evidence in any court in this state, and shall be prima facie evidence of the jurisdiction of said court over the parties to such proceedings and of all facts recited therein, and of the regularity of all proceedings prior to, and including the making of such order, judgment or decree.

Respondent filed a timely answer to the formal complaint in which he denied the allegations of misconduct. The matter was assigned to Tri-County Hearing Panel #1 for hearing. Respondent subsequently filed three pre-trial motions: a motion for summary disposition (filed January 19, 2016); a motion to preserve certain Barden estate planning documents (filed February 22, 2016); and a pre-trial motion (filed February 22, 2016). The Grievance Administrator also made a request for summary disposition pursuant to MCR 2.116(I)(2), as set forth in the Administrator's response to respondent's motion for summary disposition. The hearing panel heard oral argument on all of these motions and on March 16, 2016, issued an order that denied all three of respondent's motions, as well as the Administrator's request for summary disposition.

Respondent then filed a petition for interlocutory review and for a stay of the proceedings. In an order dated March 24, 2016, this Board denied respondent's petition and request for a stay. The parties appeared for a hearing before the panel on March 28, 2016. At the outset, respondent renewed his motion for summary disposition, which was taken under advisement, and the Administrator's counsel presented his case in chief as to misconduct. At the conclusion of that hearing, the panel made rulings, later confirmed in an order dated April 1, 2016, that granted respondent's request for summary disposition as to the allegation that respondent did not make reasonable efforts to expedite the litigation consistent with the interests of his clients, in violation of MRPC 3.2; dismissed the allegations contained in Count One (Barden Estate) of the formal complaint in its entirety, as that count was deemed abandoned by the Administrator; denied respondent's request that the remaining allegations be dismissed; and, ordered respondent to file an amended witness list, and gave the Administrator an opportunity to object.

Respondent filed a motion requesting that the hearing panel correct the April 1, 2016 order to properly memorialize the hearing panel's verbal rulings made at the March 28, 2016 hearing. In an order dated April 22, 2016, respondent's request was denied and the panel ruled that its April 1, 2016 order would stand as issued. Respondent then filed a second petition for interlocutory review of the hearing panel's orders of April 1 and April 22, 2016, and renewed his request for a stay of the proceedings. On May 12, 2016, this Board issued an order denying respondent's second petition for interlocutory review and for a stay.

Respondent presented his defense at five separate misconduct hearings held on May 13, May 16, June 6, June 24, and August 12, 2016. On January 19, 2017, the hearing panel's report on misconduct was issued. The report emphasized the narrow scope of the conduct the panel believed they were to review in determining whether respondent committed the misconduct as charged in Count Two of the formal complaint.

> At the heart of the matter is respondent's filing of two documents: a petition alleging conspiracy and a breach of duty by the Wayne County Probate Court which has been referenced as the "conspiracy petition," and a petition seeking to disqualify the judge. The allegations of misconduct that are under consideration by the panel stem from the filing of those documents and the actions taken by respondent subsequent to doing so.
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> Ultimately, it was acknowledged by respondent that he chose to file the surcharge and disqualification petitions. Respondent acknowledged that by doing so, disqualification would be compelled. Respondent anticipated a visiting judge and stated that he wanted that outcome: a new jurist. Respondent named Judge Burton as a party to require his disqualification. [Report 1/19/17, p 3.]

Based on those findings of fact, the hearing panel found violations of MCR 2.114(D)(3), 5.114(A)(1), 9.104(1), (2) and (4), and MRPC 3.5(d), and 8.4(c).[2] The panel found no violations of

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[2] MCR 9.104(1), (2), and (4) and MRPC 8.4(c), the "general" or "catch-all" rules, relate to conduct that is prejudicial to the proper administration of justice, that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach, and that violates the standards or rules of professional conduct adopted by the Supreme Court.

MCR 2.114(D)(3) provides, as follows:

> The signature of an attorney or party, whether or not the party is represented by an attorney, constitutes a certification by the signer that: . . . (3) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

MCR 5.114(A)(1) provides that:

> The provisions of MCR 2.114 regarding the signing of papers apply in probate proceedings except as provided in this subrule.

MRPC 3.1 (meritorious claims and contentions), and 3.2 (expediting litigation).

The parties then filed sanction briefs, as requested by the panel. The Administrator argued for disbarment under ABA Standard 6.21 and relevant case law from this Board and the Court.[3] The Administrator's brief recommended that, if the panel was unwilling to impose disbarment, respondent be suspended for at least three years with conditions that required him to undergo a psychological exam by a medical doctor selected by the hearing panel assigned to his petition for reinstatement, required him to draft a letter of apology to Judge Burton, John M. Chase, Jr., and Melvin D. Jefferson, Jr., and, upon approval of the draft by the hearing panel assigned to his petition for reinstatement, required him to publish the letter, at his own expense, in the Michigan State Bar Journal. Respondent argued that ABA Standard 6.2 did not apply, cited to two prior decisions,[4] and requested that the panel issue an order imposing no discipline.

The parties appeared before the panel on February 13, 2017, for a hearing on sanctions. The Administrator again argued for the imposition of disbarment, or at the very least a three-year suspension, requiring not only reinstatement, but recertification. Respondent renewed his request for an order imposing no discipline.

On May 4, 2017, the hearing panel's report on sanctions was issued. Applying the theoretical framework of the ABA Standards, the panel found that the duty respondent violated was owed to all concerned: clients, the forums before which they appear, colleagues, and the public; the panel accepted respondent's admissions that he consciously undertook the action at issue, knew exactly what he was doing, and did it with intent; the panel did not address whether there was potential or actual injury caused because they found that what occurred was more "a violation of philosophical and inherent foundations to the practice of law, i.e., the public display of disrespect toward the forum one addresses." (Sanction Report 5/4/17, p 3.) Of the five aggravating factors the Grievance Administrator argued applied, the panel found two applicable: ABA Standard 9.22(g) (refusal to

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MRPC 3.5(d) provides that:

> A lawyer shall not: (d) engage in undignified or discourteous conduct toward the tribunal.

[3] In support of disbarment, the Grievance Administrator cited to *In re Mains,* 121 Mich 603 (1899); and, *Grievance Administrator v Cornelius,* 91-201-GA; 91-253-FA (HP Report 12/7/92).

[4] *Grievance Administrator v Fieger,* 01-55-GA (reprimand, by consent); and, *In re Nathan S. French,* 08-93-RD (45 day suspension, by consent).

acknowledge the wrongful nature of the misconduct), and ABA Standard 9.22(i) (substantial experience in the practice of law). The panel further found one applicable mitigating factor: ABA Standard 9.32(a) (absence of prior disciplinary record.) Ultimately, the panel found that ABA Standard 6.22, calling for suspension, applied and imposed a 180-day suspension. The panel further found that the conditions requested by the Administrator were unnecessary.

On May 8, 2017, respondent filed a timely petition for review and a petition for stay. Shortly thereafter the Administrator filed a cross-petition for review. Respondent's request for a stay was granted on May 23, 2017.

II. Discussion

Respondent raises two issues on review: that there was a "gross violation" of his due process rights, and that the panel improperly refused to consider the truthfulness of the pleadings in question. Specifically, respondent asks this Board to determine: (1) that a formal complaint bereft of factual allegations in support of misconduct does not meet constitutional due process requirements; and, (2) that factually true expression contained in non-frivolous pleadings can never provide a basis for attorney misconduct. (Respondent's Brief in Support, p viii.)

First, we do not find that the formal complaint was "bereft of factual allegations." To the contrary, the complaint contains nineteen separate paragraphs, including thirty-six subparagraphs, of factual statements pertaining to the underlying litigation and the specific pleadings drafted and filed by respondent. The complaint also attached complete copies of the referenced pleadings. MCR 9.115(B), requires that a formal complaint set forth the "facts of the alleged misconduct." Likewise, MCR 2.111(B)(1) requires that a complaint "contain a statement of facts . . . on which the pleader relies in stating the cause of action, with the specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called to defend." The purpose of a complaint and the primary function of all pleadings is to give notice of the nature of a claim sufficient to permit the opposite party to take a responsive position, and accordingly, no pleading is insufficient, so far as facts are concerned, which serves such function. *Auburn v Brown*, 60 Mich App 258, 263 (1975). A pleading is sufficient if it reasonably informs defendant of the nature of the case he is called upon to defend. *Major v Schmidt Trucking Co.*, 15 Mich App 75, 79 (1968). The formal complaint clearly provided the required notice to respondent of the conduct in question, the

charges alleged against him, and the nature of claims against which he was called on to defend. Thus we find no violation of respondent's due process rights in that regard.

Second, we find that it was not necessary for the hearing panel to consider the truthfulness of respondent's statements in order to make findings regarding the specific charges set forth in the formal complaint. The complaint charged that respondent's conspiracy petition prejudiced the administration of justice because of how it was used: to force the probate judge's disqualification. (Formal Complaint ¶41(d).) The panel's report on misconduct repeatedly made note of this distinction:

> Throughout the proceedings, it was emphasized that the panel was not charged with, and would not entertain, conducting a trial on the underlying case or whether any alleged conspiracy occurred in the Wayne County Probate Court. Rather, **the issue for the panel is whether respondent's actions in that matter constituted misconduct.** In response to petitioner's claim that misconduct occurred, respondent has repeatedly asserted that he had "overwhelmingly good cause" in filing the surcharge petition. However, this panel is unwilling to substitute its opinion for those rendered by the Wayne County Probate Court, the Michigan Court of Appeals and the Michigan Supreme Court, all of which have reviewed the matter. **The panel's scope is narrowly tailored and limited to the actions of respondent.** It does not sit as forum of review for any other tribunal. [Misconduct Report 1/19/17, p 3. (Emphasis added.)]

As noted, the conduct at issue arises out of respondent's *actions* after his clients did not receive their requested relief to have the January 13, 2010 order providing for a prior lien judgment for $120,075.85 set aside. After Judge Burton denied that motion, respondent did not file a claim of appeal. Rather, he filed the conspiracy petition which asserted, among other things, that: Judge Burton replaced the nominated trustees with "long-time probate court cronies [Chase and Jefferson];" raised the issue of a conspiracy between Chase and Jefferson and Judge Burton to deplete the estate of its assets and "unjustly and unlawfully direct these and other assets to the possession, control and ownership of Chase and Jefferson;" and, referred to the "exorbitant" fees charged by Chase and Jefferson.

Respondent then relied upon the filing of the conspiracy petition as the main reason to disqualify Judge Burton in the motion to disqualify that he filed shortly thereafter. That motion alleged, in part, that Judge Burton entered a series of "erroneous and abusive rulings" and that it was

Judge Burton's "abuse of office" that caused respondent to file the conspiracy petition. However, and as noted by the Court of Appeals, other than insinuations, no support was ever provided to show that there was in fact some sort of conspiracy, conflict of interest, or inappropriate conduct. Rather, the record simply showed that Judge Burton rendered decisions that were adverse to respondent's clients. Adverse rulings against a party, even if later determined to be erroneous, do not constitute a sufficient basis to require disqualification. *In re Contempt of Henry,* 282 Mich App 656, 680 (2009). Just as ordinary citizens cannot turn to vigilante justice when unsatisfied with the outcome of a criminal investigation or lack of prosecution, so too an attorney cannot simply bypass established procedural rules and create a process to serve his/her client's interests.

The panel's report on misconduct characterizes the language contained in the conspiracy petition as "incendiary" which formed the basis for the panel's finding that respondent engaged in undignified and discourteous conduct toward a tribunal, in violation of MRPC 3.5(d). We agree. As the panel stated: "respondent effectively accused a judge of criminal conduct." (Misconduct Report 1/19/17, p 5.) The Court of Appeals found that these allegations were baseless. Such unsupported charges serve to weaken and erode the public's confidence in an impartial adjudicatory process.

It also cannot be forgotten that respondent admitted that he chose to file the conspiracy and disqualification petitions, and that by doing so, disqualification would be compelled, that he wanted a new jurist, and that he named Judge Burton as a party to require his disqualification. (Tr 3/28/16, pp 190-191; Tr 8/12/16, pp 20, 78, 154-161, 166-167, 238-239; Tr 2/13/17, pp 77-78, 85; Tr 3/6/17, pp 29, 44-45, 50.) These admissions provide the basis for the panel's finding that respondent engaged in forum shopping, conduct long condemned as prejudicial to the administration of justice.[5] They further provide sufficient evidentiary support for the panel's findings that respondent violated MCR 9.104(1) and (2); and MRPC 8.4(c).

Respondent next argues that the panel committed error in finding a violation of MCR 2.114 and 5.114, once they determined that respondent's pleadings were not frivolous, in violation of MRPC 3.1. However, this argument again focuses on the content of the pleadings rather than how,

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[5] See *Grievance Administrator v Harold S. Fried, et al.,* 456 Mich 234 (1997); *In re Geoffrey N. Fieger, et al.,* US District Court, Eastern District of Michigan Southern Division, Case No. 96-X-74698; and *Grievance Administrator v Nathan S. French,* 08-93-RD, referencing *In the Matter of Nathan S. French,* US District Court Eastern District of Michigan Southern Division, Case No. 07-X-50315.

or the purpose for which, the pleadings were filed and/or used. The hearing panel specifically found that respondent violated MCR 2.114(D)(3) and 5.114(A)(1) because respondent's pleadings were "drafted and filed to force the recusal of a judge." (Misconduct Report 1/19/17, p 5.) Again, we agree. Respondent's conspiracy petition was deliberately interposed in the probate proceedings for no other reason than to force the recusal of Judge Burton through a process that can only be characterized as improper. We find that there is proper evidentiary support in the record for the panel's findings in that regard.

Finally, both parties take issue with the discipline imposed by the hearing panel. Respondent argues that the 180-day suspension imposed by the hearing panel is excessive and that the ABA Standards support the imposition of no more than an admonishment and/or an order imposing no discipline. The Administrator argues that the suspension imposed by the hearing panel is insufficient given the injury and potential injury caused by respondent's conduct.

The Board's review of sanctions imposed by a hearing panel is not limited to the question of whether there is proper evidentiary support for the panel's findings, rather, the Board possesses "a greater degree of discretion with regard to the ultimate result." *Grievance Administrator v Benson*, 06-52-GA (ADB 2009), citing *Grievance Administrator v Handy*, 95-51-GA (ADB 1996). See also *Grievance Administrator v August*, 438 Mich 296, 304; 304 NW2d 256 (1991). This greater discretion to review and, if necessary, modify a hearing panel's decision as to the level of discipline, is based, in part, upon a recognition of the Board's overview function and its responsibility to ensure a level of uniformity and continuity. *Grievance Administrator v Brent S. Hunt*, 12-10-GA (ADB 2012), citing *Matter of Daggs*, 411 Mich 304; 307 NW2d 66 (1981).

Respondent argues that the hearing panel inappropriately applied Standard 6.22, because that standard is only applicable if respondent was found to have actually caused harm. However, Standard 6.22 states:

> Suspension is generally appropriate when a lawyer knows that he or she is violating a court order or rule, and causes injury or *potential* injury to a client or a party, or causes interference or *potential* interference with a legal proceeding. [Emphasis added.]

The hearing panel specifically indicated that it did not address the question of "potential" or "actual" injury caused, instead indicating that:

> What occurred in this matter was a violation of more philosophical and inherent foundations to the practice of law, i.e., the public display

> of disrespect toward the forum one addresses. While no person lost something per se, the justice system, as a whole, loses when an attorney charged with upholding the proper administration of justice fails to perform that task. [Sanction Report 5/4/17, p 3.]

In a footnote in its decision in *Grievance Administrator v Albert Lopatin*, 462 Mich 235 (2000), the Court cautioned that "our directive to follow the ABA Standards is not an instruction to abdicate their [the ADB and hearing panels] responsibility to exercise independent judgment." *Id.* at 248 n 13 (2000). While the panel may not have specifically addressed the question of injury, they appear to have exercised some independent judgment, in conjunction with the theoretical framework of the Standards, in determining that harm to the justice system occurred.

Respondent's request that the Board reduce discipline to an admonishment cannot be granted. Hearing panels and the Board do not have the power to issue admonishments. *Grievance Administrator v Gregory S. Thompson*, 97-68-GA (ADB 1998). The power to admonish is reserved exclusively for the Attorney Grievance Commission under MCR 9.114(B). A hearing panel which finds that a charge of misconduct has been established by a preponderance of the evidence must enter an order of discipline. MCR 9.115(J)(3).

Respondent also asks that we enter an order finding misconduct and imposing no discipline. Such an order will rarely be entered. *Grievance Administrator v Bowman*, 462 Mich 582, 589 (2000), citing *Grievance Administrator v McFadden*, 95-200-GA (ADB 1998), lv den 459 Mich 1232 (1998). For an order finding misconduct but imposing no discipline to be appropriate, the misconduct would have to be so highly technical, the mitigation so overwhelming, or the presence of other special circumstances so compelling that the imposition of a reprimand would be practically unfair. *Grievance Administrator v Ralph E. Musilli*, 98-216-GA (ADB 2000). None of those elements, which would make such an order appropriate, apply to the conduct found by the hearing panel in this matter.

The Administrator also takes issue with the panel's determination, or lack thereof, of the injury or potential injury, albeit for different reasons than respondent does. The Administrator's cross-petition argues that the 180-day suspension imposed by the hearing panel is insufficient given the injury and potential injury caused by respondent's conduct. However, and as noted by respondent in his response, beyond stating that "time and energy" of the co-fiduciaries and the judge were "wasted," because they had to respond and rule on the pleadings filed by respondent, no actual

evidence of harm in this regard was offered by the Administrator.[6] According to the Administrator, taking this "injury" into account should require that the suspension imposed by the panel be increased to a one-year suspension. However, no specific authority is cited to support this contention.

As indicated earlier in this opinion, there is no doubt that conduct that constitutes judge and/or forum shopping is misconduct subject to discipline:

> It is unethical conduct for a lawyer to tamper with the court system or to arrange disqualifications, selling the lawyer's family relationship rather than professional services. A lawyer who joins a case as co-counsel, and whose principal activity on the case is to provide the recusal, is certainly subject to discipline. [*Grievance Administrator v Fried, et al.*, 456 Mich 234, 245 (1997).]

However, the level of discipline imposed for such a violation has varied. *Grievance Administrator v Nathan S. French,* 08-93-RD (HP Report 11/4/08) (45-day suspension, by consent, for attempting to circumvent E.D. Mich. Local Rule 83.11(a) [judge shopping]); *Grievance Administrator v James J. Rostash,* 93-117-GA (HP Report 10/27/98) (90-day suspension, by consent, (after remand) for pleading no contest to allegations of attempting to improperly affect the judicial assignment in a criminal case and attempting to take advantage of the perpetual disqualification of a certain judge with a reputation of imposing more lenient sentences); *Grievance Administrator v Charles J. Golden,* 93-119-GA (HP Report 9/22/00) (reprimand, by consent, (after remand) for pleading no contest to participating in a scheme instituted for the purpose of affecting a judicial assignment).

The hearing panel determined that respondent's actions in filing the pleadings in question, and using the "incendiary" language that he did, warranted a suspension of sufficient length to require reinstatement proceedings under MCR 9.123(B). However, we view respondent's actions differently.

Respondent's vociferous representation of his clients and dedication to their cause is evident and was evident during respondent's presentation to this Board at oral argument. But what is also evident to us is that respondent's actions in filing the subject pleadings, resulted from overzealous

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[6] In fact, respondent notes that no responsive pleadings were filed in response to respondent's pleadings and no court proceedings were conducted, Judge Burton simply issued an opinion and order regarding both petitions.

advocacy, rather than a selfish or dishonest motive, an aggravating factor the Administrator's counsel argued applied, but the panel specifically found inapplicable. For those reasons, and given the fact that respondent has no prior disciplinary history in twenty-four years of practice, we find that the level of discipline imposed should be decreased to a reprimand.

III. Conclusion

For the reasons discussed above, we conclude that the hearing panel's findings of misconduct have proper evidentiary support and, therefore, should be affirmed. With regard to level of discipline, we find that a decrease in the level of discipline imposed by the hearing panel is warranted. Therefore, we will enter an order vacating the hearing panel's order of suspension and will enter an order of reprimand.

Board members Louann Van Der Wiele, Rev. Michael Murray, Dulce M. Fuller, James A. Fink, John W. Inhulsen, Jonathan E. Lauderbach, Barbara Williams Forney, Karen O'Donoghue, and Michael B. Rizik, Jr. concur in this decision.