IN THE MATTER OF LEROY DAGGS,
Member of the State Bar of Michigan,
Respondent.
No. 35447-A

Decided: December 2, 1979

OPINION

INTRODUCTION

Respondent Leroy Daggs has been found to have violated Canons 1, 6, and 7 of the Canons of Professional Responsibility, specifically DR 1-102(A)(4-6); DR 6-101(A)(1-3); and DR 7-101(A)(1-3). While this Board affirms the Findings of Fact of Oakland County Hearing Panel No. 7 in this matter, it is our decision that the two-year suspension rendered by the Panel should be reduced to a one-year suspension. Respondent's request that the matter be remanded to a different hearing panel because of his belief that the appointed panel acted with racial prejudice is denied.

Three situations illustrate the basic premise of the complaint. Count I deals with Respondent's failure to make a timely appeal from a criminal conviction in federal court, Count III deals with an unreasonably long delay in probating an uncomplicated estate, and Count IV deals with an unreasonable delay by Respondent in seeking to be formally relieved of a court-assigned appeal from an indigent client-who had been convicted of a felony in Detroit Recorder's Court. Although the Panel dismissed Count II and did not address Court V, because of the controversy arising from the inclusion of these allegedly prejudicial counts in the Formal Complaint, they will be discussed separately.

COUNT I

Count I relates to the attorney-client relationship between Sceola Kuykendall and the Respondent who was retained by Kuykendall to perfect an appeal from a criminal conviction to the U.S. Court of Appeals (6th Circuit). The Panel found the facts to be as follows: that Respondent Daggs agreed to and did file a claim of appeal and was listed as the attorney of record in the 6th Circuit; that Respondent did receive certain monies from Kuykendall to cover some of the costs of the appeal; that the appeal was dismissed for lack of progress, but Respondent incorrectly notified his client that the appeal had been denied.

Respondent totally failed to fulfill his responsibility as attorney of record and because of this failure Kuykendall lost his right to appeal his felony conviction. In addition, Respondent tried to hide this dereliction of duty by notifying his client that the appeal had been "denied" instead of "dismissed for lack of progress."

Respondent contends that he was never attorney of record, that Mr. Nelson, a former partner in the firm, handled the trial, and Mr. Berg, another partner, filed the notice of appeal and that his name, Leroy Daggs, on the records of the 6th Circuit was an error on the part of the court clerk. He

also argues that he never received a show-cause letter prior to the dismissal, perhaps because he moved his office, and that he told his secretary to write Kuykendall about the dismissal and she incorrectly wrote that the appeal had been denied. It was also error on his secretary's part that a copy of the dismissal letter from the court was not attached to the "denial" letter.

Regarding these errors, including the U.S. Court of Appeals notice to show cause, allegedly not received in the mails by the Respondent, this Board is aware that occasional clerical errors do occur. It is difficult, however, to accept as coincidence that at every stage of this case there was actually an error excusing the Respondent. Respondent moved his office, but he did remain in the same building, making timely forwarding of the letter a likelihood; therefore, the Board can understand tile Panel's reluctance to accept the defense of clerical and postal error.

Respondent asserts that the findings of the Panel are against the great weight of the evidence because the Panel could not conclude as it did without believing the testimony of Kuykendall, a convicted heroin dealer. There is a clear conflict as to whom to believe regarding the amount of sums paid to Respondent by Kuykendall. Respondent now challenges with expert evidence the validity of a receipt for $2,500, claiming the amount had been altered from $500 to $2,500. Respondent claims that the $900 paid him was merely to file a claim of appeal and secure a transcript, and that Kuykendall expressed an intention to hire other counsel to prepare briefs and argue the appeal. Respondent claims he was retained only for the limited purpose of preserving Kuykendall's right to appeal. Although Respondent under the rules had no discovery of evidence, including said receipt, the proceedings before the panel were extended over several months and involved a number of adjournments permitting Respondent ample opportunity to refute said evidence at the trial stage.

Respondent also argues that his only offense is one of benign omission in failing to more completely document his arrangement with Kuykendall.

This Board accepts the findings of fact of the Hearing Panel and does not consider such to be against the great weight of the evidence. The credibility of witness Kuykendall, a convicted felon, is a matter of Judgment of the trier of fact. Michigan Rules of Evidence 601, 609(a) (1978). We accept the ability of this Hearing Panel to weigh the testimony given before them and to assess its veracity appeal had been "denied" instead of "dismissed for lack of progress."

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This Board accepts the findings of fact of the Hearing Panel and does not consider such to be against the great weight of the evidence. The credibility of witness Kuykendall, a convicted felon, is a matter of judgment of the trier of fact. Michigan Rules of Evidence 601, 609(a) (1978). We accept the ability of this Hearing Panel to weigh the testimony given before them and to assess its veracity. Since the amount of money paid to Respondent is another area of judgment for the trier of fact, we must again affirm the Panel since they were in the best position to weigh conflicting evidence.

It is disturbing that certain negotiations, initiated by Respondent Daggs, occurred after tile complaint was filed. According to the testimony of complainant Kuykendall's brother, the complaint was to have been withdrawn by Kuykendall and no damaging testimony offered in exchange for repayment of $3,900 in legal fees by Respondent Daggs, (even though withdrawal of a complainant-client does not preclude the Grievance Administrator from pursuing his case, GCR 1963, 964.2). The mere repayment of disputed fees or other funds to a complainant client does not relieve the accused attorney of ethical accountability and, although the same can be considered in mitigation, such payments sometimes constitute an enticement to a complainant and thereby become an aggravating factor. Regarding the offer of repayment the Panel report provides in pertinent part:

> . . . the Panel notes that respondent [Mr. Daggs] did not dispute the claim that around July, 1978, when this panel held its first meeting, there was discussion between the respondent and Mr. Kuykendall regarding the withdrawal of the complaint in exchange for the payment of certain funds. While it is apparently disputed whether or not the funds were actually paid, [to Mr. Daggs in the first place]. . . the respondent did not deny there were conversations carried on with Mr. Kuykendall's brother relative to withdrawing the complaint either

> Just prior to or after the first hearing. This resulted in Mr. Kuykendall first withdrawing his complaint by letter...[Exhibit 14]. Mr. Kuykendall testified the reason for this change of heart was that respondent had agreed to pay him $3,900 [Exhibit 14] and that respondent then refused to pay. Respondent offered no testimony as to this series of events. [emphasis supplied] Report of Oakland County Hearing Panel No. 7, January 10, 1979.

The question remains: "Why did Respondent offer no rebuttal to the testimony that Respondent offered payment of $3,900 in exchange for the withdrawal?"

COUNT III

Count III deals with Respondent's undue delay in probating the estate of Wilhilmina Bailey, the mother of Sidney H. Bailey, Jr., the Complainant. It is undisputed that Respondent was retained in August 1969; that the Petition for probate was not filed until March 25, 1971; and that thereafter nothing was done by Respondent with regard to the estate until April 27, 1976, when the bond of the administrator was filed, and the estate was closed. Respondent has offered no explanation for the delay except that in the early 1970's he was having some difficulties, and that he did not receive necessary information from Mr. Bailey. Mr. Bailey testified, however, that he continually tried to get Respondent to do something about the estate. The Panel accepted the testimony of Mr. Bailey, finding him to be forthright and noting that his testimony was more plausible than Respondent's.

In contrast to his answer to the Formal Complaint, Respondent now seems to acknowledge the truth of the accusations in Count III,[1] but argues that his discipline is without basis in reason and inconsistent with the nature of the claimed misconduct. Although we substantially reduce the discipline rendered by the Panel, we find no mitigating factors in the context of Count III and affirm the Panel in finding that Respondent did violate Canon 1, DR 1-102(A)(5-6); Canon 6, DR 6-101(A)(l-3); and Canon 7, DR 7-101(A)(1-2).

COUNT IV

In regard to Count IV, Respondent admits that he was appointed appellate counsel for Harvey Dering by Judge Hathaway of Recorder's Court in February, 1976, but insists that he did not learn of the appointment until the following June (1976), at which time Mr. Dearing requested Respondent's removal from the case and that the State Appellate Defender's Office handle the appeal. Respondent repeatedly tried (orally) to obtain removal from the case, but no motion requesting such court approved withdrawal was filed until January, 1977, and that motion was never brought on for hearing.

Respondent failed to file a Claim of Appeal within the time limit, but a delayed appeal was granted on May 11, 1977, and Respondent, with co-counsel, did file a brief. Judge Hathaway indicated, on May 25, 1977, that he would relieve Respondent of the appointment.

Although Respondent did not receive notice of the appointment for several months, even after the notice he did not take any formal steps to be relieved and the resulting delay was inexcusable. It was Respondent's obligation promptly to seek effective removal from the case. Respondent thereby violated DR 1-102(A)(5-6); DR 6-101(A)(3); and DR 7-101(A)(1)(3).

This Board again affirms the findings of the Hearing Panel as the same are consistent with the evidence and are based upon correct interpretations and applications of the disciplinary rules. The so-called "realities" of practice in Recorder's Court do not modify the well-established standards of professional conduct with must apply. The rights of the accused client and the severe strain on that client during criminal prosecution, conviction, and subsequent appeal periods make the timely handling of appeals a matter of particular importance. (In re Harrington, Mich Att Discipline Bd File No. 35542-A, Jan. 9, 1979).

However, we do recognize some basis for Respondent's argument that in Detroit Recorder's Court procedural matters, such as withdrawal of counsel, are frequently handled Informally. Whether such practices arc Justified remains questionable; Respondent seems to have had some basis for concluding that the verbal withdrawal was acceptable. We do not feel that the circumstances of Count IV alone or in combination with the other misconduct are so severe or unmitigated as to warrant a two-year suspension.

COUNTS II AND V

Respondent's original petition for review challenged the make-up of the Hearing Panel in Oakland County, specifically on the basis that all three members were white while Respondent Is black. Respondent also asserts a right to have the matter heard by a panel whose members have Recorder's Court experience. These are not proper questions for review since a motion to disqualify a panel or members thereof must be filed within 10 days after a case has been assigned to a panel, or 10 days before the hearing date, whichever is earlier. [GCR 1963, 912.3(a); 964.6(b)(1)]. In this case, the geographic location and make-up of the panel was known to Respondent prior to commencement of proceedings.[2] Furthermore, it is common practice to assign hearings to panels outside the area where the accused attorney practices In order to avoid unnecessary notoriety and insure an objective trier of fact.

We come to the question of the inclusion of Counts II and V In the complaint, the so-called "enhancement" counts. Count II details a reprimand which Respondent received in November 1976, due to the way he handled a Traffic Court case. The file had been marked "closed but not dismissed, subject to being reopened." There were no new facts before the hearing panel except that the former client was eventually satisfied with the way the traffic case was handled. The Hearing Panel dismissed this complaint.

Count V introduced no new allegations of fact, but merely recites that in 1970 Respondent had received a three-month suspension for failure to process his client's case. This count was included to show that Respondent did not meet the standard of conduct established by the Supreme Court, and to demonstrate that Respondent over a long period of time has habitually failed to meet said standards.

Respondent in his Petition for Review clearly charged the panel with "an overt racially prejudicial attitude toward respondent . . ." (P.2, Petition for Review filed Jan. 30, 1979). Later, Respondent took the position, in oral argument, that the Panel members were subtly and unintentionally biased and influenced by Counts II and making it easier to believe accusations directed toward a black attorney that they would never accept about a white lawyer. It is further argued that the inclusion of these two counts is error resulting in a miscarriage of justice contrary to GCR 956.1, and provides grounds for remand to a new panel.

This Board considers the Panel members involved to be of high integrity and ability, and we find no indication in the record of bias which might affect their decision and findings in this matter. In this regard, it is noted that although insertion of Counts II and V in the complaint may be error on the part of the Grievance Administrator, the Board does not find that insertion of these counts was prejudicial to the Panel and notes that the Panel dismissed these counts (one summarily).

GCR 956 provides that a proceeding is not invalid because of error which does not result in a miscarriage of justice. The Board does not feel that there has been a miscarriage of justice in light of the whole record, and further refers to GCR 951.1 which permits liberal construction of the Rules for the protection of the public, courts, and the legal profession.

CONCLUSION

In conclusion, this Board finds (1) that there is no need for further evidence to be taken; (2) that there exists proper evidentiary support on the whole record to sustain the findings of the hearing panel; (3) that the record discloses no basis whatsoever for a claim of basis or racism; and (4) that nothing in the record justifies substituting the Board's judgment for that of the Panel. The Supreme Court delegated to panels certain discretion in order that the profession might regulate itself by means of contributions and concerned input of its own membership. Remanding cases with insufficient basis weakens the voluntary panel system which is designed to protect both respondents and complainants. The decision of the Hearing Panel is therefore Affirmed with reduction of the two-year suspension to one year.

CHAIRPERSON COTE' and MEMBERS BUESSER, McDEVITT & REAMON, CONCUR

FOOTNOTES:

1. See Review Hearing Transcript, p. 59.

2. See State Bar Grievance Administrator v Grubbs, 396 Mich 275, 278 (1976) in which the Supreme Court held that: ". . . while it might be advisable for a Hearing Panel to include practitioners familiar with the type of practice in which respondent is engaged, failure to do so did not result in a denial of due process."

BOARD MEMBER WILLIAM G REAMON, CONCURRING:

I concur in the conclusion of the majority, but feel constrained to emphasize that although the Grievance Administrator clearly met his burden of proof in this case, I am seriously troubled by the inclusion of Count V, relating to an offense occurring several years prior, which Was unnecessary and irrelevant, and constitutes error which, in another situation, might well prove to be prejudicial and grounds for re-hearing.

It should be further noted that regarding the comparative credibility of the testimony (which is raised as a critical issue by Respondent) the record provides no source of support for Respondent's defense. Respondent's long periods of procrastination and inaction remain without sufficient explanation; no defense whatsoever is asserted in the Bailey probate matter, nor even one of coincidental clerical error.

DISSENTING OPINION OF VICE-CHAIRPERSON LYNN H. SHECTER, with Secretary David Baker Lewis and Board Member Msgr. Clement Kern concurring:

The decision of the Attorney Discipline Board (ADB) fails to eliminate the errors which tainted the proceedings alleging Respondent's misconduct from their inception. We respectfully dissent.

I.

THE FORMAL COMPLAINT

The State Bar Grievance Administrator filed a five-count formal complaint against Respondent in February, 1978, alleging various acts of misconduct for which disciplinary action was sought.

Count I alleged that Respondent was retained to take and perfect a federal criminal appeal, was paid $3,900 as a fee, but failed to complete the appeal. The United States Court of Appeals for the Sixth Circuit eventually entered an order dismissing the appeal for want of prosecution. Respondent wrote to his "client" stating that the appeal had been denied. The Grievance Administrator also alleged in Count I that Respondent had failed to provide a full and thorough disclosure of all facts and circumstances in the matter and had made "misrepresentations" because Respondent denied receipt of $3,900 in attorney fees, denied he had been retained to process the appeal, and denied that the "client" was misinformed with respect to the dismissal of the appeal.

In Count II, the Grievance Administrator sought to revive a 1971 grievance filed against Respondent with respect to his representation of a client in the Recorder's Court for the City of Detroit, Traffic and Ordinance Division. It was alleged in that grievance that a retainer was paid but Respondent failed to appear to represent his client. The (then) State Bar Grievance Board admonished Respondent for his conduct but did not file a formal Complaint. The Board indicated that the "file [was] closed but not dismissed subject to be reopened." Count II was an apparent attempt to reopen the cause.

In Count III, Respondent was alleged to have been retained by Sidney Bailey, Jr., to probate a certain estate, but that the estate was not completely probated until six (6) years after Respondent was retained. The Count further alleged that Respondent attempted to refer the matter to two other attorneys without the knowledge of consent of his client.

Count IV related to Respondent's appointment as appellate counsel in February, 1976, on behalf of Harvey Dearing, Jr., who had been convicted of a felony in the Recorder's Court of the City of Detroit. The formal complaint alleged that Respondent failed to file a timely appeal and failed to take any action on appeal. Further, the formal complaint alleged that an application for leave to appeal was filed thirteen (13) months beyond the date the case was assigned to Respondent, was treated as an application for delayed appeal by the Court of Appeals and was granted with $100 costs being assessed against Respondent.

In Count V, the Grievance Administrator asked for additional discipline to be imposed against Respondent because he had been previously disciplined.[1]

II.

PROCEEDINGS BEFORE THE HEARING PANEL

The Hearing Panel found that Respondent failed to fulfill his professional responsibility with respect to Counts I, III and IV. Counts Il and V were dismissed by the Hearing Panel. No evidence was heard as to Count V.

Testimony with respect to Count I of the formal complaint,[2] the pivotal allegation of misconduct, consumed the major portion of testimony before the Hearing Panel. It is not disputed that although Respondent appeared and represented the grievant, Sceola Kuykendall, at arraignment on federal felony charges, another attorney in Respondent's firm represented Kuykendall during the pretrial and trial stages. Testimony by or on behalf of Kuykendall asserted that Respondent was engaged to "perfect an appeal" for Kuykendall of Kuykendall's conviction on felony charges in the United States District Court for the Eastern District of Michigan, Southern Division, and that Respondent was paid a total of $3900 by Kuykendall for that purpose. Respondent testified that his firm was engaged only to preserve Kuykendall's legal right to appeal the conviction but for no other purpose. For this reason, Respondent testified $900 was accepted from Kuykendall to defray certain, costs, including transcript costs, associated with the appeal.

The Notice of Appeal and a Motion for Extension of Time to File were prepared and filed by Attorneys Nelson or Berg, but not by Respondent.

On entry of an order by the United States Court of Appeals for the Sixth Circuit dismissing Kuykendall's appeal for "lack of prosecution," a copy of which was sent to Respondent, Respondent advised Kuykendall by letter that the appeal had ban "dismissed" and requested that Kuykendall contact him immediately.[3] Although Respondent testified that a copy of the order of the Sixth Circuit was enclosed with the letter to Kuykendall, Mrs. Kuykendall, who received and opened the letter, testified that nothing was enclosed with it.

A substantial amount of testimony was taken before the Hearing Panel regarding the payment of fees to Respondent. There is no conflicting testimony with respect to the receipt by Respondent's firm of $900 for costs. Substantial conflicting testimony is found in the record regarding the payment of $1,000 in January of 1975 and $2,000 on April 30, 1975. Of significance is an alleged receipt from Respondent to Kuykendall for $2,500 which Respondent claimed was for $500 which was altered to reflect receipt of $2,500.[4]

Respondent testified that he has never handled a federal criminal appeal and had no intention of doing so in the Kuykendall matter.

Kuykendall testified that he was prepared to withdraw his grievance on payment of $3,000 by Respondent but that the alleged settlement aborted when firs: Kuykendall testified against Respondent at the initial hearing before the Hearing Panel.[5]

Testimony with respect to Count II was that Respondent was engaged by Raymond Black to represent him in the Recorder's Court of the City of Detroit, Traffic and Ordinance Division, on a charge of drunk driving. Black testified that he had been a "three-time loser" on drunk driving charges prior to this instance. He further testified that on the day he was to appear and be sentenced, Respondent appeared in court on time but Black did not.[6] Since Respondent was required to be present for judicial proceedings in the Recorder's Court, he left the Traffic and Ordinance Division but telephoned back to speak to the judge who was hearing the case to urge that Black not be sentenced to a jail term.[7] He voluntarily waived his right to have Respondent present when Black arrived at the Court to be sentenced. Black testified that it was his belief Respondent ha-earned his fee and that he wanted to drop the case against Respondent.[8]

Testifying with respect to Count III, Sidney Bailey, Jr., the grievant, testified that he and his sister retained Respondent to probate an estate and paid Respondent $100 for this in 1969.[9] It is uncontroverted that Respondent did not file the petition to probate the estate until a lapse of twenty (20) months from the date he was engaged. The estate was comprised of real estate which ultimately descended according to law. The estate was not probated until six years after Respondent was retained. There is a conflict concerning the reasons the estate was not closed prior to that. Respondent testified that because of the absence of necessary information, the papers required for completing probate of the estate could not be filed. Bailey, however, testified that whenever information was requested by Respondent, it was supplied.

Testimony with respect to Count IV related to the manner in which Respondent handled the representation of Harvey Dearing, Jr., as appointed counsel for the appeal of a case tried to a verdict in the Recorder's Court of the City of Detroit. It appears through testimony that Respondent was appointed counsel for appellate proceedings for bearing on February 23, 1976.[10] Testimony is uncontroverted that Respondent was not notified of his appointment in any way until June, 1976, when bearing wrote to Respondent to advise that he wanted another lawyer.(Tr. at 106.) Respondent testified that he immediately contacted the assigning judge, the Honorable James Hathaway, and advised that he did not feel comfortable accepting the appeal and wished to be relieved of responsibility. Respondent did not file a motion to withdraw as counsel until January of 1977,[11] at which time another attorney was appointed as counsel to assist Respondent with the appeal. No

documentary proof [12] was submitted as evidence before the Hearing Panel that Respondent was assigned to the Dearing matter. The Court of Appeals granted a motion for a delayed appeal and assessed $100 costs against Respondent.[13] No evidence was introduced and no testimony was adduced before the Hearing Panel to establish when Dearing's right to appeal expired.[14] The Hearing Panel did not accept any evidence with respect to Count V.

III.

PROCEEDINGS BEFORE THE ADB

Prior to the hearing before the ADB, Respondent's counsel filed an amended petition asserting the discovery of new evidence and seeking a remand of Respondent's case for further proceedings before the Hearing Panel. The receipt allegedly given by Respondent to Kuykendall for $2,500 was examined pursuant to request of Respondent's counsel by a handwriting expert. The handwriting expert concluded that the receipt had been altered by someone other than Respondent. Such evidence had not been submitted to the Hearing Panel.

IV.

DUE PROCESS

Attorney discipline procedures are, without question, unique and have as a primary aim the protection of the public. While it is clear that these proceedings are not criminal in nature, and therefore the responding attorney does not have the full panoply of rights available to him or her which would be incumbent in a criminal proceeding, State Bar of Michigan v Woll, 387 Mich 154, 161, 194 NW2d 835 (1972), this does not mean that any evidence, no matter how slight, is sufficient to sustain a finding by the Hearing Panel.

This case at bar is an instance where a Hearing Panel struggled mightily to ferret out, from a complaint crowded with irrelevancies, those offenses which were sufficiently supported by the evidence to warrant the imposition of discipline. We cannot say that the struggle has been wholly successful, through no fault of this Panel. Because it is impossible to determine, from a review of the record, that the inclusion of two (2) highly prejudicial and irregular Counts, although dismissed by the Hearing Panel, did not irreparably taint the proceedings, we would find that due process requires that a new hearing be held.

Count II, supra, involved an attempt by the Grievance Administrator to resurrect a seven (7) year-old complaint against Respondent which, at the time the complaint was received, was not deemed worthy of any action other than admonishment. However, the Administrator took the rather unusual step of indicating that while the file was closed, it was not dismissed but could be reopened. No time limitation was indicated as to how long this state of limbo would continue to exist.[15]

Counsel for the Grievance Administrator could cite only one instance where previous misconduct or alleged misconduct was asserted as grounds for the imposition of professional discipline subsequent to the time that the first offense had been resolved. Apparently, it was the

Grievance Administrator's desire to make this a "test case." There was no reason, however, for such an effort, since it has been long decided that the Grievance procedure does not envision the possibility that an attorney may be disciplined twice for the same deed. In re Lewis, 389 Mich 668, 209 NW2d 203 (1973). Moreover, in the context of new allegations of professional misconduct, the inclusion of previous allegations of professional misconduct has been held to fail to give Respondent "fair notice" of the precise charges leveled against him in the new disciplinary proceedings. In re Ruffalo, 380 US 544 (1968). Surely, the resurrection of the allegations of misconduct in Count II by the Grievance Administrator, eight (8) years later falls within this prohibited ambit.

Count V was similarly an apparent attempt by the Grievance Administrator to see how far he could go without a substantive charge. The Hearing Panel refused to accept any evidence with respect to Count V yet, the essence of Count V is that no evidence could have been presented. This was a "bad man" count in which the Administrator attempted to make the fact that Respondent had been previously disciplined, a raison d'etre for imposing discipline at the time of the hearing. The rationale offered by the Administrator was that such previous discipline could, of course, be considered by the Board when determining the appropriate discipline, if any, to be imposed on Respondent as a consequence of the substantive allegations before the Court. But this begs the question. Prior discipline should not be used as an indication of present misconduct.

It is true that the Hearing Panel dismissed both Counts II and V. However, we cannot say that the presence of these Counts did not so taint the proceedings as to render it impossible for a fair decision to be reached in this case. It would be impossible for anyone, even individuals as fair-minded as the Hearing Panel Members in the case at bar, not to be aware that the Grievance Administrator was thus demonstrating to the Trial Tribunal that he considered Respondent to be a bad person. Why else, for example, would he have chosen this particular case to attempt to achieve not one, but two, additional grants of authority, both of which were unrelated to a substantive count, as if to insure that any discipline which would be meted out would be sufficient to purge Respondent from the practice of law?

The particularly bad effects of such a technique are especially apparent where, as in the case at bar, the question of Respondent's credibility is particularly significant. Count I was a situation where the testimony of both Respondent and complaining witness were so diametrically at odds, the decision really turned on who the Panel chose to believe. It is difficult to imagine that the addition of the "hammer" Counts did not predispose the Panel or at the very least have some effect on the Panel's decision of whose version of events to accept.

We will not sit here today and decide that the Panel's judgment of which witness was more credible should be questioned. What we do strongly suggest, however, is that the Panel's perception just had to have been affected by the posture of the case. This, in conjunction with the newly-offered Affidavits, suggest that perhaps some reconsideration of at least Count I should take place. At such a re-hearing, the Panel can consider some of the questions raised by our Brothers on this Board, particularly in terms of the "settlement" negotiations conducted with regard to the $3,000 in the Kuykendall matter. It should be noted here that Respondent was not required to defend any particular accusation of attempting to suborn or interfere with the orderly process of the Grievance machinery.

The same concerns, however, do not confront us with Count III. I t was uncontroverted that the time for probating the estate was an unacceptable six (6) years after Respondent was retained. The complaining witness testified that whenever Respondent requested information, that information was provided. The Respondent testified that the delay was caused because he did not have the information. Obviously, the two explanations are not inconsistent. The Respondent might have taken an unacceptably long time in requesting the information, which the complaining witness supplied whenever Respondent requested it. It is true that apparently no one was harmed by the delay. But this, we would suggest, is an element which ought to be considered in mitigation, and is relevant only to the degree or amount of discipline to be imposed, and is not relevant as to whether the Respondent did indeed violate any of the Code of Professional Responsibility.

We must confess that Count IV presents the greatest difficulty. Our Brothers correctly state the facts, but we believe that our brethren have not adequately considered the substantial burden with which this Hearing Panel was required to deal. Thus, the Panel first had to deal with prosecutorial overreaching. Then, the Panel had to deal with the obvious fact that none of its members was familiar with the practices in Recorder's Court in the City of Detroit. We do not here suggest today that sloppy substandard practices are acceptable, nor that Just because attorneys practice in Recorder's Court, they should be permitted to practice in a manner which would be unacceptable in any other Court. What we do suggest, however, is that a determination of the culpability of Respondent must be made within the guidelines and understanding of just what the practice really is. Thus, the nature of Respondent's defense was the standard of practice in Recorder's Court. While our Brothers correctly state that our Supreme Court has not mandated that a practitioner familiar with a particular type of practice must be included on a Hearing Panel, State Bar Grievance Administrator v Grubbs, 396 Mich 275; 240 NW2d 233 (1976), it is unwise and inadvisable to attempt to render a decision based on this kind of defense without some touchstone by which to judge Respondent's contention. Thus, the Panel could exercise its authority under the Court Rules to appoint a special master, or request that Respondent and the Grievance Administrator provide expert witnesses on Just this particular subject, or perhaps even supplement their membership with an individual experienced in this kind of practice. We are, of course, concerned with the effect of the kind of practices which apparently took place in the instant case and which delayed the processing of an appeal for a defendant who was incarcerated at the time. The harm to that individual is immeasurable, even if an appeal, when later filed, was then denied. But, in the instant case, when it appears that the appellant himself didn't want Respondent, and the Recorder's Court Judge approved the conduct of Respondent, it would appear that the cause of this particular allegation might well have been an administrative and Judicial nightmare, not of Respondent's making, but one in which he was caught.

CONCLUSION

We would uphold the findings of the Hearing Panel of professional misconduct as it refers to Count III. This was not an instance where conflicting testimony required a Judgment of the credibility of witnesses, for the testimony of the witness and Respondent were not incompatible. Further, it does not appear that Respondent denied the substantive allegations.

However, we would also find that insofar as Counts I and IV are concerned, these questions should be remanded to a new Hearing Panel to consider these Counts without the unfortunate taint and opprobrium inherent in Counts II and V. At this new Hearing, insofar as Count I is concerned, Respondent shall be required to bring forth testimony in support of his contentions of newly-discovered evidence. Insofar as Count IV is concerned, if the Hearing Panel does not include individuals familiar with practices in Recorder's Court, City of Detroit, we would require that the Panel adopt whatever mechanism it chooses within the ambit of these Court Rules to insure that it receives this expert guidance. We wish to reiterate that insofar as the procedure followed appeared to have been the norm in Recorder's Court, perhaps that norm ought to be re-examined insofar as it appears to be susceptible to prejudicing the speedy appellate rights of incarcerated defendants.

We would leave the question of the imposition of appropriate discipline for the violation of Count III which we would uphold to the decision of the new Hearing Panel. We would require that the new Hearing be held and completed within sixty days of the disposition of Respondent's appeal.

Footnotes to Dissenting Opinion:

1. Respondent was privately reprimanded in February, 1970 for failure to represent a client and was suspended for three (3) months in September, 1970, for failure to process a client's case due to a fee dispute. That suspension was affirmed by the Supreme Court of Michigan. In re Daggs, 384 Mich 729, 187 NW2d 227 (1971).

2. Testimony was not taken on each count separately, in the order alleged in the Complaint.

3. The record is unclear whether Respondent was still associated, as a partner, in the firm of Daggs, Nelson and Berg on the date of entry of such order, May 27, 1975.

4. Respondent's Amended Petition to the ADB attaches the Affidavit of a handwriting expert, who concluded the receipt was not altered by Respondent as Kuykendall testified. The Affidavit, however, because it was not part of the record before the Panel, will be considered by this Board only in conjunction with Respondent's request for a new hearing because of newly-discovered evidence.

5. Kuykendall testified that Respondent paid $3,000 to Kuykendall's brother in consideration for Kuykendall's withdrawing the grievance against Respondent. According to Kuykendall, he returned the $3,000 to Respondent after Respondent accused Kuykendall of failing to keep his agreement because Kuykendall permitted his wife to testify at the initial hearing of the Hearing Panel. The accusation was made in the course of a "three-way" telephone conference between Kuykendall, Respondent, and Kuykendall's brother who was present in Respondent's office. See Tr. at 217, 219, 253-55.

6. Black admitted that Respondent had negotiated a reduction of the charge from "drunk driving" to "driving while visibly impaired." Tr. at 28.

7. (Tr. at 18, 19, 20). Black was ultimately sentenced to a fine of $400, or an eighty (80) day Jail term. (Tr. at 20). He opted for payment of the fine of a deferred-payment basis. The sentence was "arranged by Respondent. (Review Petitioner)." (Tr. at 25).

8. After testifying that he only wanted his money back, the following colloquy appears in the Hearing Panel Transcript. (Tr. 26):

> "Mr. Beier: So you feel that he earned the money, then is that right?
>
> The Witness: Yes. Yes, because a few times that he did come down and knowing that it cost money for a lawyer to come down and this is the amount did pay him. So, in other words, I feel justified so I say drop the case."

9. Bailey testified that the $100 was to be a "down payment" on a total fee of $200 for probating the estate. (Tr. at 45, 46).

10. Respondent testified that it is not his personal practice to accept appeals in criminal cases. (Tr. at 112).

11. Respondent testified that it was the custom in Recorder's Court not to file formal motions of withdrawal as long as counsel spoke to the court and received approval for withdrawal.

12. Clerks of Recorder's Court could not locate the file in this matter. (Tr. at 82 and 83).

13. The State Appellate Defender's Office was appointed to represent bearing on the merits in the Michigan Court of Appeals after Respondent was permitted to withdraw as appellate counsel. The record does not reflect the outcome of the appeal on the merits.

14. The record reflects that Dearing's appeal as of right would have expired sixty (60) days after the trial transcript had been prepared and filed. The expiration date could have been before or after Respondent learned that he had been appointed as counsel on appeal.

15. We here wish to indicate our concern with the apparent practice of the Grievance Administrator in maintaining, apparently forever, requests for investigation which are received and which are not acted on. While it seems that maintaining such files for a finite period of time, perhaps (3) years, could prove useful and helpful, he instant case appears to indicate the injustice of the present procedure. Certainly, the public is not protected by reviving evidence of a youthful indiscretion, or, for example, in using such an offense to buttress more recent and significant problems. Further, the state of suspended animation for a file clearly does nothing more than provide the Grievance Administrator with an opportunity to render culpable a recent offense, which, like the initial one, would not, of itself, have been worthy of consideration by a Panel.