STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellee,

v

Timothy H. McCarthy, Jr., P 74698,

Respondent/Appellant.

Case No. 15-72-GA

Decided: August 30, 2017

Appearances:

Stephen P. Vella (review) and Frances A. Rosinski (at the hearing), for the Grievance Administrator, Petitioner/Appellee

Michael Alan Schwartz and Michael E. Cavanaugh (at the sanction hearing and on review), Michael F. Cavanagh (review), and Kenneth M. Mogill (at the misconduct hearing), for the Respondent/Appellant

BOARD OPINION

Tri-County Hearing Panel #5 issued an order disbarring respondent from the practice of law, effective March 18, 2017. Respondent filed a petition for review and requested a stay of discipline. In an order dated March 17, 2017, respondent's request for a stay was denied. The Attorney Discipline Board conducted review proceedings in accordance with MCR 9.118, which included a review of the whole record before the hearing panel and consideration of the parties' briefs and arguments presented to the Board on review. For the reasons discussed below, we affirm the order of disbarment.

The Grievance Administrator filed a formal complaint against respondent on July 8, 2015, stemming from his representation of a client, Debra Ploucha, in a medical malpractice claim. The one-count complaint alleged that respondent committed misconduct when he failed to properly file a notice of intent necessary to pursue Ms. Ploucha's malpractice claim, even though respondent repeatedly advised Ms. Ploucha that he was preparing and would serve the notice of intent. It was alleged that respondent did not communicate with Ms. Ploucha about her legal matter between July of 2013 and February 18, 2014, and repeatedly ignored Ms. Ploucha's inquiries about the status of

her case, in violation of MRPC 1.1(c), 1.3 and 1.4(a). Furthermore, the complaint asserted that respondent made intentional misrepresentations to Ms. Ploucha and the Attorney Grievance Commission during the investigation of this matter, including the fabrication of correspondence supposedly sent to Ms. Ploucha, in violation of MRPC 8.4(b). The complaint also alleged violations of MRPC 8.4(a); MCR 9.104(1)-(4) and (6); and MCR 9.113(A).

After ruling on a series of motions, the panel ultimately found that the Grievance Administrator sufficiently proved all of the allegations in the formal complaint. The panel determined that ABA Standard 4.61 is the most applicable, which provides for disbarment when "a lawyer knowingly deceives a client with the intent to benefit the lawyer or another, and causes serious injury or potential serious injury to a client." The panel also determined that disbarment would also be appropriate under ABA Standards 4.41 (lack of diligence), 6.11 (false statements, fraud, and misrepresentation), and 7.1 (violations of duties owed as a professional).

On review, respondent argued that the hearing panel abused its discretion when ruling on a motion to strike a supplemental witness list, and by failing to reopen the proofs after the misconduct hearing had concluded. Respondent also raised a claim of ineffective assistance of counsel against his former attorney. Respondent requested that the Board reverse the order of disbarment and remand the matter back to the hearing panel to reopen the proofs.

Evidentiary and procedural rulings by a hearing panel are to be reviewed under the "abuse of discretion" standard. The application of this standard has been discussed by our appellate courts:

> A trial court's decision whether to admit or exclude evidence will not be disturbed on appeal absent an abuse of discretion. *Elezovic v Ford Motor Co*, 472 Mich 408, 419; 697 NW2d 851 (2005). The trial court abuses its discretion if its decision is outside the range of principled outcomes. *People v Orr*, 275 Mich App 587, 588-589; 739 NW2d 385 (2007). "A decision on a close evidentiary question ordinarily cannot be an abuse of discretion." *Lewis v LeGrow*, 258 Mich App 175, 200, 214; 670 NW2d 675 (2003). Moreover, even if a court abuses its discretion in admitting or excluding evidence, the error will not merit reversal unless a substantial right of a party is affected, MRE 103(a), and it affirmatively appears that the failure to grant relief is inconsistent with substantial justice, MCR 2.613(A). See *Chastain v General Motors Corp*, 467 Mich 888, 654 NW2d 326 (2002); *Lewis, supra* at 260. [*Grievance Administrator v Gregory J. Reed*, 10-140-GA (ADB 2002), pp 5-6 (citation omitted).]

Here, there is no evidence the hearing panel committed an abuse of discretion. First, the hearing panel's decision to strike respondent's supplemental witness list prior to the misconduct

hearing was proper because it is undisputed the witness list was untimely. In addition, allowing new witnesses, including an alleged expert, three days before the hearing would have materially prejudiced the Grievance Administrator.

In support of his position on this issue, respondent focuses on the fact that he was not allowed to call two specific witnesses – forensic computer expert Larry Dalman and Dr. Pamela Montgomery – to show he did not engage in the alleged misconduct. This argument is fatally flawed, however, because these witnesses were not named on the supplemental witness list. Rather, Mr. Dalman and Dr. Montgomery were not identified as potential witnesses until November 14, 2016 – more than two months after the misconduct report was issued, and nearly a year and a half after the supplemental witness list was filed. The only witnesses on the supplemental witness list were a polygraph expert, which respondent now agrees is inadmissible, and character witnesses, who had no testimony to offer regarding the specific allegations of misconduct. As such, the hearing panel did not abuse its discretion in striking the supplemental witness list, or otherwise commit an error requiring reversal in this regard.

Respondent also argues that the hearing panel erred in failing to reopen proofs after the misconduct hearing was completed. The Michigan Supreme Court has found that a hearing panel can exercise its discretion to reopen proofs if it determines that the improperly excluded evidence would be decisive. *Grievance Administrator v Lopatin*, 558 NW2d 725, 726 (1997). Here, respondent has failed to show there was any evidence improperly excluded. Furthermore, even if the evidence should have been allowed, it would not have been decisive.

Respondent again relies on the purported testimony of Mr. Dalman and Dr. Montgomery to support his argument that the proofs should have been reopened. However, neither of these witnesses would have offered testimony to support respondent's defense, and such testimony is certainly not decisive. Although respondent argued Mr. Dalman would have testified that he inspected respondent's computer and could confirm that the Notice of Intent was created on April 17, 2014, this does not prove respondent delivered the Notice of Intent as claimed. Likewise, Dr. Montgomery was expected to testify that on April 17, 2014, she spoke with respondent and he indicated he was on his way to Jackson to deliver papers. This does not prove that respondent actually went to Allegiance Hospital that day to deliver the Notice of Intent, especially where respondent testified he was not sure of the date that he served the Notice of Intent. (12/10/15 Tr, pp

44, 51, 84, 86-87; 1/13/16 Tr, pp 360-361.) In addition, respondent testified that although the proof of service reflects April 18, 2014 as the date of service, he recalls being unable to deliver the notice on the date he intended. (12/10/15 Tr, pp 44, 51). Therefore, even if these witnesses had been allowed to testify, the outcome would have been the same.

Respondent's final argument on review is a claim of ineffective assistance of counsel. This argument also fails because there is no right to effective assistance of counsel in attorney disciplinary proceedings. See *Welch v Bd of Prof'l Responsibility*, 193 SW3d 457, 465 (Tenn 2006) (no right to effective assistance of counsel in attorney disciplinary proceedings); *Goeldner v Mississippi Bar*, 891 So 2d 130, 133-134 (Miss 2004) (while a bar disciplinary proceeding is quasi-criminal in nature, it is not sufficiently criminal in nature to trigger the requirement of effective assistance of counsel); *In re Gherity*, 673 NW2d 474, 479 (Minn 2004) (rejecting argument that an attorney facing disciplinary proceedings has the right to counsel); *In re Slattery*, 767 A2d 203, 212 n 10 (DC 2001) (finding no cases in which effective assistance of counsel has been held to be a due process requirement in bar disciplinary proceedings); *Walker v State Bar*, 49 Cal 3d 1107, 1116 (1989) (attorneys facing the disciplinary process do not have a constitutional right to counsel). Furthermore, even if respondent had a right to counsel, there is no support for a finding of ineffective assistance because respondent failed to show that the outcome would be different, but for his former counsel's alleged errors. See *People v Ackley*, 497 Mich 381, 389; 870 NW2d 858 (2015) (citing *Strickland v Washington*, 466 U.S. 668, 694 (1984)).

In reviewing a hearing panel decision, the Board must determine whether the panel's findings of fact have "proper evidentiary support on the whole record." *Grievance Administrator v August*, 438 Mich 296,304; 475 NW2d 256 (1991). See also *Grievance Administrator v T. Patrick Freydl*, 96-193-GA (ADB 1998). "This standard is akin to the clearly erroneous standard [appellate courts] use in reviewing a trial court's findings of fact in civil proceedings." *Grievance Administrator v Lopatin*, 462 Mich 248 n 12 (2000) (citing MCR 2.613(C)). The hearing panel's misconduct report contains a very detailed review of the evidence presented and analysis of how that evidence supported the allegations of misconduct set forth in the formal complaint.

On review, respondent focuses on whether the evidence shows he hand-delivered the Notice of Intent to the hospital. However, even if he had conclusive proof that the notice was delivered as he claims, it would not change the fact that the notice was not properly served as required by statute.

Therefore, the outcome is the same: Ms. Ploucha would have a defective Notice of Intent either way. See *Fournier v Mercy Community Health Care Sys-Port Huron*, 254 Mich App 461, 468; 657 NW2d 550 (2002) (holding that the "use of the word 'shall' in subsection 2912b(2) makes mandatory the requirement that the notice be mailed in accordance with its provisions.")

Furthermore, although respondent did not address the appropriate level of discipline, we note that the misconduct established warrants disbarment, even without considering the misrepresentations found by the panel regarding delivery of the Notice of Intent. We agree with the panel that respondent's story is incredible in many ways, but, additionally, his callous disregard for the interests of his client and the numerous misrepresentations admittedly made to her about the status of her matter are undisputed.

Here, the panel carefully weighed and discussed the evidence, and specifically found respondent to be lacking in credibility. "Because of the panel's unique opportunity to observe the witnesses, we accord great deference to the panel's assessment of credibility and demeanor." *Grievance Administrator v Dennis M. Hurst*, 95-32-GA (1996). Respondent's lack of credibility, coupled with the evidence presented by the Grievance Administrator to support the allegations, supports the panel's findings of misconduct. Accordingly, the order of disbarment is affirmed.

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

Board members John W. Inhulsen and Jonathan E. Lauderbach were absent and did not participate.