

Attorney Discipline Board

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GRIEVANCE ADMINISTRATOR,
Attorney Grievance Commission,

Petitioner/Appellee,

Case No. 19-3-MZ
(Ref. 15-72-GA)

v

TIMOTHY H. McCARTHY, JR., P 74698,

Respondent/Appellant.

**ORDER AFFIRMING HEARING PANEL'S DENIAL OF RESPONDENT'S
MOTION FOR POSTJUDGMENT RELIEF**Issued by the Attorney Discipline Board
333 W. Fort St., Ste. 1700, Detroit, MI

Ingham County Hearing Panel #5 of the Attorney Discipline Board issued an order on February 24, 2017, disbaring respondent from the practice of law. Respondent filed a petition for review regarding the panel's finding of misconduct, as well as a petition for stay on March 9, 2017. The request for stay was denied, and the order of disbarment became effective March 18, 2017. The Attorney Discipline Board conducted a review hearing on June 21, 2017, and issued its opinion and order on August 30, 2017, affirming the panel's order of disbarment. Respondent thereafter filed an Application for Leave to Appeal with the Michigan Supreme Court, which was denied on January 3, 2018.

On January 4, 2019, respondent filed a motion for postjudgment relief with the Attorney Discipline Board, in which he argues that there was newly discovered evidence that warranted reopening the record and retrying the underlying disciplinary matter. Respondent's motion was presented to Ingham County Hearing Panel #5 for its review and decision. On April 9, 2019, the panel issued an order denying respondent's request for postjudgment relief, finding that (1) respondent failed to identify any newly discovered evidence, (2) respondent's motion was untimely; and (3) even if the alleged newly discovered evidence had been admitted during the misconduct phase of the hearing, it would not have changed the outcome of the findings of misconduct. Respondent filed a petition for review with the Board on April 30, 2019.

The Attorney Discipline Board has conducted review proceedings in accordance with MCR 9.118, including review of the evidentiary record before the panel and consideration of the briefs and arguments presented by the parties at a review hearing conducted August 21, 2019. Following its review, the Attorney Discipline Board has concluded that the order denying respondent's motion for postjudgment relief entered by the panel should be affirmed.

To obtain a new disciplinary hearing on the ground of newly discovered evidence, respondent must show (1) “that the evidence and not merely its materiality is newly discovered,” (2) that it is not merely cumulative, (3) that a different result is probable on remand, and (4) that reasonable diligence could not have discovered and produced the evidence. *In re Daggs*, 411 Mich 304, 309 (1981). See also *People v Cress*, 468 Mich 678, 693 (2003). The party seeking a new hearing or trial carries the burden of satisfying all four parts of this test. *Id.*

Michigan case law makes clear that evidence is not newly discovered if the defendant or defense counsel was aware of the evidence at the time of trial. See *People v Purman*, 216 Mich 430, 438-439 (1921); *People v Lewis*, 31 Mich App 433, 437 (1971). If evidence is known to the defendant at the time of trial but is claimed to have been unavailable, it must be shown that the defendant “could not, using reasonable diligence, have discovered and produced the evidence at trial[.]” *Cress*, *supra* at 693.

Respondent asserts the proposed testimony of Dr. Pamela Montgomery, regarding a conversation she had with respondent on the day he claims to have delivered the Notice of Intent to Allegiance Hospital, should be considered newly discovered evidence. We disagree. Such testimony was certainly known to respondent at the time of the misconduct hearings and could have been produced with reasonable diligence. The formal complaint put respondent on notice that his service of the Notice of Intent would be a dispositive issue in this case, and that he would need evidence to support his claims of delivery. Dr. Montgomery’s proposed testimony involved a conversation she had with respondent himself on the day he claims to have delivered the Notice of Intent to Allegiance Hospital. Since respondent was a participant in the conversation with Dr. Montgomery, he cannot now deny knowledge or argue that it is “newly discovered.”

Similarly, the testimony of respondent’s proposed computer expert, Larry Dalman, also cannot be considered “newly discovered.” Respondent asserts that Mr. Dalman analyzed his computer, and can now establish when the Notice of Intent was created. However, the formal complaint put respondent on notice that the creation and service of the Notice of Intent was one of the primary issues in this case. There is no evidence Mr. Dalman or respondent’s computer were unavailable at the time of the misconduct hearings. Therefore, respondent could have immediately hired an expert to examine his computer in order to rebut the allegations in the formal complaint.

On review, respondent argues that the hearing panel erred in declining to convene an evidentiary hearing before denying the motion for postjudgment relief. A trial court’s decision whether to conduct an evidentiary hearing is reviewed for an abuse of discretion. *People v Unger*, 278 Mich App 210, 216 (2008). An abuse of discretion occurs where the trial court chooses an outcome falling outside a “principled range of outcomes.” *People v Babcock*, 469 Mich 247, 269 (2003).

The hearing panel made its decision in this case based upon the record in the underlying matter and numerous briefs filed by the parties, as well as the individual knowledge each panelist gained from observing the proceedings and from their participation at the hearings. In denying respondent’s motion for postjudgment relief, the hearing panel explained that it was relying on respondent’s failure to identify any “newly discovered evidence.” It is clear that respondent did not present any new evidence, especially where the same evidence presented has already been considered by the hearing panel, this Board and the Michigan Supreme Court. Under these circumstances, the failure to hold an evidentiary hearing is not outside of the range of principled outcomes. See *People v Dixon*, 217 Mich App 400, 409-410 (1996) (remand denied where the defendant failed to establish newly discovered evidence).

NOW THEREFORE,

IT IS ORDERED that the hearing panel's order denying respondent's motion for postjudgment relief is **AFFIRMED**.

IT IS FURTHER ORDERED that respondent shall, pay court reporting costs incurred by the Board for the review hearing conducted on August 21, 2019, in the amount of \$127.00. Costs may be paid by check or money order made payable to the Attorney Discipline System and submitted to the Attorney Discipline Board, 333 West Fort St., Ste. 1700, Detroit, MI 48226, for proper crediting.

ATTORNEY DISCIPLINE BOARD

By: Michael Murray
Rev. Michael Murray, Chairperson

Dated: September 27, 2019

Board members Rev. Michael Murray, James A. Fink, Barbara Williams Forney, Karen O'Donoghue, Michael B. Rizik, Jr., Jonathan E. Lauderbach, and Anna Frushour concur in this decision.

Board members John W. Inhulsen and Linda Hotchkiss, MD were absent and did not participate.