

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OFFICE OF SECRETARY

OPINION 90-18

Issued August 17, 1990

[Not Current- subsequent rule amendments to Gov. Bar. R. V.]

SYLLABUS: A formal complaint before the Board of Commissioners on Grievances and Discipline may be amended by the Relator prior to a hearing without presenting the additional counts to a probable cause panel.

OPINION: We have before us your request for an opinion on amended formal complaints filed with the Board under Governing Bar Rule V. A probable cause panel of the Board determines whether substantial credible evidence exists for the filing of a complaint. Once the Board's panel finds that probable cause exists and a hearing is scheduled against the respondent, you ask if the formal complaint can be amended prior to the hearing without taking the additional counts before a probable cause panel.

Under Gov. Bar R. V (10) a probable cause panel consisting of three board members reviews each investigation after a certified grievance committee or disciplinary counsel has determined that substantial credible evidence exists to file a formal complaint. The panel reaches an independent determination of the allegations concerning an attorney's misconduct and then certifies the formal complaint to the entire board or dismisses the complaint.

Your questions relate only to those cases in which a probable cause panel has certified a matter to the board and a formal complaint has been served on the respondent attorney. Procedurally your question can be reduced to whether a second, independent probable cause finding has to take place before all matters are consolidated for trial before one hearing panel of the board. A determination that an independent review by a probable cause panel is necessary would place it on a footing similar to a probable cause finding issued in a felony criminal matter by a municipal court or grand jury. If a second probable cause finding is not necessary, the assigned hearing panel could decide whether probable cause existed regarding the additional counts. Therefore, the original complaint could be amended or supplemented with the new counts against the same attorney respondent.

Gov. Bar R. V contains no explicit provisions regarding amended complaints. The Board by rule has stated that it shall follow the Ohio Rules of Civil Procedure wherever practicable unless a specific provision of Gov. Bar R. V provides otherwise. Under Civil Procedure Civil R. 15(A), a party may amend his pleading by leave of court or by written consent of the adverse party. Civil R. 15 (E) permits a party after reasonable notice and upon just terms to serve on the opposing party a supplemental pleading setting forth transactions, occurrences or events which have happened since the date of the original pleading. Ohio Courts have held that leave to amend should be freely given whenever justice so requires. See e.g., Hoover v. Sumlin (1984), 12 Ohio St. 3d 1. Absent any intentional delay or improper motive the best rule for a trial court is to permit a party to amend its complaint. Central Motors Corp. v. Pepper Pike (1983), 9 Ohio App. 3d 18.

Gov. Bar R. V does provide some guidance in answering this question. Section 42 states that the process and procedure under this rule shall be as summary as reasonably may be. This section further provides:

Amendments to any complaint notice, answer, objections, report or order to show cause may be made at any time prior to final order of the Supreme Court. The party affected by such amendment shall be given reasonable opportunity to meet any new matter presented thereby. (emphasis added)

There exists a more compelling reason to permit relators to amend their disciplinary complaints than the rationale employed in civil litigation. Here a motion to amend is usually not occasioned by the uncovering of new facts or defenses through discovery but the receipt of additional complaints from third parties or clients. The relator has good reason to believe the additional counts constitute further evidence of ethical violations and should be presented for the protection of the public and the integrity of the profession. Such a policy underscores the consistent philosophy enunciated by the Ohio Supreme Court in its lawyer disciplinary cases. See, e.g., Ohio State Bar Association v. Illman (1976), 45 Ohio St. 2d 159.

Given the letter, spirit and philosophy of Gov. Bar R. V, the rules of the Board, the precedent in Ohio's disciplinary cases and the requirements of the Ohio Civil Rules outlined above, it is our conclusion that a complaint may be amended by a motion directed to the hearing panel. The panel chairman shall then permit the respondent a reasonable chance to respond to new

material and for any other relief the ends of justice may require. The panel chairman also has the power to prevent any abuses of this rule if he or she finds that the relator is avoiding an independent determination by a probable cause panel by initially concealing some charges and then filing them by way of amendment. In those instances the panel chairman may refer the new counts against respondent to a probable cause panel when it next meets.

In our view, this ruling does not deprive the respondent of any important procedural due process right. Under the terms of Gov.Bar R. V (10) (B) (ii) only the relator is able to challenge a determination made by a probable cause panel. A parallel right is not vested in the respondent to challenge on an interlocutory basis a panel's determination that probable cause exists for the filing of a formal complaint. A respondent is permitted under the rules to raise its motion to dismiss with the hearing panel, the entire board, or the Ohio Supreme Court. Thus, there is no right granted for a final Board or judicial review of a finding that probable cause exists; however, it may continue to be raised by the respondent after a hearing on the merits has taken place.

This is an informal, non-binding advisory opinion based upon the facts presented and limited to questions arising under the Code of Professional Responsibility.