GRIEVANCE ADMINISTRATOR,
Petitioner/Appellant,
v
DENNIS H. SNYDER, P-29791,
Respondent/Cross-Appellant.

File Nos. DP 134/85; DP 174/86; DP 214/86

Decided: October 5, 1988

BOARD OPINION

By Majority, Robert S. Harrison, Patrick J. Keating, Theodore P. Zegouras

The hearing panel ordered that respondent's license to practice law be suspended for thirty days as the result of findings that respondent 1) prepared and filed suit after his discharge by his clients in order to protect his right to a retainer and made misrepresentations to the clients, the Grievance Administrator and a volunteer investigator appointed by the Attorney Grievance Commission; 2) neglected a criminal appeal and failed to file a timely answer to a Request for Investigation; and 3) failed to take timely action on his client's behalf in a child support modification matter. Separate petitions for review have been filed by the Grievance Administrator, the respondent and complainants Donald and Tamara Schepplemen. Based upon our review of the whole record, we conclude that the factual findings of the hearing panel should be affirmed but we modify the discipline imposed by reducing to a reprimand. The order of discipline is further modified by directing that respondent make restitution to Donald and Tamara Schepplemen in the amount of $460.00.

The Formal Complaint filed by the Grievance Administrator charges that Respondent, Dennis H. Snyder, engaged in various acts and omissions which constituted professional misconduct in his handling of separate unrelated legal matters on behalf of three clients. The panel's factual findings are briefly summarized as follows:

Leroy Williams Case--respondent Snyder was appointed to represent Leroy Williams on March 25, 1985 on an appeal from an escape conviction. The claim of appeal was filed on May 16, 1985. Despite late-brief warning letters by the Court of Appeals in December 1985 and January 1986 and an order to show case dated July 7, 1986, respondent did not file the appellant brief until August 11, 1986. The panel found that the respondent's claims regarding the difficulty in obtaining a transcript did not satisfactorily explain the magnitude in the delay of filing the brief and that he neglected a legal matter in violation of DR 6-101(A)(3).

The panel found that the Grievance Administrator's Request for Investigation regarding the appeal in the Williams case was served by mail in accordance with the court rules on March 20, 1986.

Despite a "final notice" mailed April 15, 1986 no answer was forthcoming until May 22, 1986. The panel found that respondent's claim that the two letters were inadvertently misplaced as the result of an office move was "unpersuasive" and that the failed to answer the Request for Investigation within the time provided by the court rules constituted misconduct.

Betty Mackey Case--respondent was retained in early 1985 to represent Betty Mackey in a child support dispute. He appeared with his client on October 9, 1985. The Court indicated orally that child support would be increased. Despite requests from the client to Mr. Snyder for a status report from October to December 1985, he failed to secure entry of an order increasing child support retroactively. The record indicates that respondent did act diligently on his client's behalf but waited until opposing counsel moved for entry of the order and then failed to appear at the hearing on his objections. The panel found a "general pattern of delay" amounting to a violation of MCR 9.104(2) and DR 6-101(A)(3).

Donald and Tamara Schepplemen Case--Respondent Snyder was retained on May 29, 1985 by Donald and Tamara Schepplemen for the purpose of instituting a "lemon law" lawsuit as the result of their purchase of an allegedly defective automobile. Respondent requested and received a retainer of $500. On August 14, 1985, Mr. Snyder was advised by his clients that he would be discharged as an attorney when the clients advised his secretary that they no longer wished his legal representation. The secretary testified at the hearing that she communicated this message directly to Mr. Snyder who instructed her to see that the complaint was filed later that day. The panel found that despite his unequivocal discharge, the respondent proceeded to file suit on behalf of the clients in violation of DR 2-110(D)(4) and failed to account to them for unearned fees in violation of DR 2-110(A)(3). The panel also concluded that the evidence supported the Grievance Administrator's allegations that the respondent made misrepresentations to a volunteer investigator appointed by the Attorney Grievance Commission in violation of MCR 9.104(1-4,6).

Discussion

The bulk of respondent's argument with regard to all three cases is that the panel's findings were not supported by the evidence. It is not the Board's role as an appellate body to conduct a de novo review of the evidence presented to the panel. Rather, the Board is charged with the responsibility of determining whether the panel's findings do have evidentiary support, In Re: Del Rio, 407 Mich 336; 285 NW2d 277 (1977). Where, as in this case, there are sharp conflicts on factual issues, we have traditionally given deference to the panel's findings since they have had the opportunity to observe the demeanor and candor of the witnesses. See Matter of Frederick A. Sauer, File DP 25/84 (Brd. Opn. 4/16/85, p. 359). Notwithstanding respondent's forceful arguments as to the inferences and conclusions which he believes

should be drawn from the evidence, our review of the record convinces us that there was evidentiary support for the inferences drawn by the panel and that those findings should not be disturbed.

Furthermore, the Board is not persuaded that the hearing panel erred in its ruling on the admissibility of evidence, its rulings on respondent's request for further discovery or its denial of respondent's motion to summary disposition. The Board has not considered the argument that discipline should be reduced as the result of statements made to one of respondent's clients by the Administrator's staff and/or complainant Schepplemán subsequent to the panel proceedings for the reason that those allegations by the respondent do not appear in the record below and they are outside the scope of this appeal.

However, the Board must consider its broad authority to assess the appropriate level of discipline and has, in the past, exercised its "overview function with respect to the level of discipline to assure reasonable uniformity among the cases decided by its hearing panels." Matter of David N. Walsh, DP 16/83 (Brd. Opn. 8/16/84, p. 233). In our exercise of this overview function, we are led to the opinion that a reduction of discipline to a reprimand is warranted in this case.

In its conclusions, the hearing panel report states that "none of the substantive allegations against the respondent standing alone would be of significant magnitude to justify a suspension from the practice of law. However, the cumulative effect of all these findings of misconduct is of very grave concern." The panel also discussed its concern with respondent's apparent attitudinal problem including the disturbing lack of candor to the panel.

At least four of the five admonitions considered by the panel were issued under the provision of former MCR 9.106 which provides "with the respondent's consent, the Administrator may admonish the respondent with filing a complaint. An admonition does not constitute discipline." The respondent points out that, prior to June 1, 1987, an attorney's decision to accept or reject such an admonition could have been affected by the knowledge that an admonition issued by the Administrator was a strictly private communication which was not a matter of public record under any exception to MCR 9.126 and was not disclosable to a hearing panel as "discipline" under MCR 9.115(J). However, the court rule changes adopted by the Supreme Court June 1, 1987, included MCR 9.115(J)(3) which directs that hearing panels determine the discipline to be imposed after a finding of misconduct by considering "any and all relevant evidence of aggravation or mitigation . . . including previous admonitions and orders of discipline." (Emphasis added.) It is possible, the respondent claims, that if he had known that an admonition issued by the Administrator could be used as evidence in subsequent discipline proceedings, he would have exercised his right to object.

While the respondent relies on an argument of fairness and due process, the Grievance Administrator counters that sub-chapter 9.100 of the Court Rules, including the changes adopted June 1, 1987, are to be liberally construed for the protection of the public, the courts and the legal profession and that the amendment in question "applies to all pending matters of misconduct and reinstatement and to all future proceedings, even though the alleged misconduct occurred before the effective date of sub-chapter 9.100. MCR 9.102(A).

In this instance, we agree with the respondent and we rule that MCR 9.115(J)(3) should not be given retroactive application to allow the disclosure to a hearing panel of prior admonitions issued before June 1, 1987.

It is the general rule that changes in judicial procedure apply to all further proceedings and actions then pending, Jinkner v Widmer, 3 Mich App 155; 141 NW2d 692 (1966); and Reid v A. H. Robins Co., 92 Mich App 140; 285 NW2d 60 (1979). The effect of a court rule change, however, should be prospective rather than retroactive. In Re Donovan's Estate, 266 Mich 362; 253 NW 552 (1934). In this case, application of MCR 9.115(J)(3) has the retroactive effect of transforming admonitions which were previously inadmissible into admissible factors to be considered in assessing discipline.

When resolving issues of retroactivity, the normal considerations which are generally deemed controlling are the purpose of the new rule, the reliance on the old rule and the impact on the administration of justice should the change be given retroactive effect. Thompson v Thompson, 112 Mich App 116; 315 NW2d 555 (1982). An attorney who received a letter of admonition from the Attorney Grievance Commission prior to June 1, 1987 had the right to object. The recipient of such a letter could weight several factors in reaching a decision to accept or reject the admonition. Rejection of the admonition by the attorney carried with it the possibility that the Attorney Grievance Commission could then authorize the Grievance Administrator to initiate public disciplinary proceedings. On the other hand, consent to the admonition would bring the investigation to a close with no further publicity and the attorney could rely on the existing court rule which assured that evidence of the admonition would not be admissible in the event of future unrelated disciplinary problems.

Of the considerations cited by the Court of Appeals in Thompson v Thompson, supra, it is the issue of reliance which is most critical when applied in this case. It would be a violation of an attorney's right to due process to encourage his or her reliance on the admissibility of prior admonitions and to then declare them to be admissible without prior notice.

In addition to the petitions for review filed by the respondent and the Grievance Administrator, complainants Donald and Tamara Schepplemen have filed a petition for review in accordance

with MCR 9.118(A) seeking modification of the discipline order by adding a requirement that respondent make restitution to them of the $500.00 retainer which they paid to Mr. Snyder. Restitution may be set by the Board as a condition of an order of discipline, MCR 9.106(5), and the Board has ruled in the past that restitution may be considered where there is a link between the established misconduct and a readily verifiable degree of loss. Matter of Frederick A. Sauer, Jr., File No. DP 25/85, ADB Opinion 4/16/85 (Brd. Opn. p. 359). In this case, we have affirmed the hearing panel's finding that Mr. Snyder was, in fact, discharged by his clients prior to his filing of the complaint and that he has not returned any portion of the $500.00 fee which was paid. The record below indicates that filing fees of $40.00 were paid by the respondent. Under the circumstances, restitution to Mr. and Mrs. Schepplemen of the sum of $460.00 would be appropriate.

DISSENTING OPINION

By Martin M. Doctoroff and Hanley M. Gurwin

We agree with the actions taken by our colleagues with regard to the findings and conclusions of the hearing panel, the inadmissibility of admonitions issued by the Grievance Administrator prior to the court rule amendment which became effective June 1, 1987, and the award of restitution to complainants Donald and Tamara Schepplemen. We disagree, however, with the decision to reduce discipline from a thirty-day suspension to a reprimand. We are particularly troubled by respondent's delay in filing an appellate brief on behalf of his client Leroy Williams. A delay of seventeen months in the filing of an appellate brief, despite warning letters from the court and communications from the client, appears to be more than a simple act of neglect. While we would affirm the hearing panel's decision to impose a thirty-day suspension based solely upon the inexcusable delay in filing that appellate brief, we also believe that the panel's decision should be affirmed by reason of the aggravating effect of respondent's lack of candor in his interview with a volunteer counsel appointed by the Grievance Administrator and in his testimony to the panel.