

Attorney Discipline Board

FILED
ATTORNEY DISCIPLINE BOARD

10 JAN 21 PM 2:41

Grievance Administrator,

Petitioner/Appellant,

v

Victor Douglas, P 43669,

Respondent/Appellee,

Case No. 08-161-GA

Decided: January 21, 2010

Appearances:

John K. Burgess, for Grievance Administrator, Petitioner/Appellant (before the Attorney Discipline Board)

Emily A. Downey, for Grievance Administrator, Petitioner (before the hearing panel)

Victor Douglas, In Pro Per, Respondent/Appellee

BOARD OPINION

The Grievance Administrator has petitioned for review under MCR 9.118 on the ground that Tri-County Hearing Panel #17 erred in its decision to dismiss the formal complaint filed in this matter. The Attorney Discipline Board has conducted review proceedings, including review of the record below, and has taken into consideration the briefs and arguments presented to the Board at a hearing conducted December 8, 2009. For the reasons discussed below, the hearing panel's order of dismissal entered June 3, 2009, is affirmed.

I. Hearing Panel Proceedings

The formal complaint in this matter alleged that respondent was retained in May 2003 by Linda Sandberg to file a motion for relief from judgment in a criminal case under MCR 6.500 et. seq., on behalf of her incarcerated son, Brian Sandberg. Ms. Sandberg signed a written fee agreement and paid respondent the sum of \$5,000.00 for the representation. The complaint further alleged that respondent never filed the motion for relief from judgment. Instead, in November

2006, Brian Sandberg filed a motion which was eventually denied by the trial court in April 2007. According to the formal complaint, respondent never refunded any of the \$5,000.00 that he was paid for the legal representation. The formal complaint charged respondent with, among other things, neglecting a legal matter, failing to act with reasonable diligence, and failing to refund unearned fees, in violation of Michigan Rules of Professional Conduct 1.1(c), 1.3, and 1.16(d).

Hearings on the charges of misconduct were conducted by the panel on January 29, 2009, and April 28, 2009. At the outset, the panel received exhibits offered by the Grievance Administrator, including the fee agreement and the court records from the criminal proceeding involving Brian Sandberg.

The fee agreement signed by Linda Sandberg provided in pertinent part:

Brian J. Sandberg (Client) employs and retains the law firm of Victor Douglas, Esq. (Attorney) to represent Client in the following matter: § 6500 Motion (3rd Cir. Ct./ JDG. Cahalan). [Petitioner's Exhibit 1.]

The Grievance Administrator called complainant Brian Sandberg, who testified that he retained respondent in May of 2003. (Tr 1/29/09, pp 13-14). When asked the purpose of the representation, Mr. Sandberg replied:

To help me edit the Motion for relief in judgment [sic] that I had already written, to make it more effective then – to make it more effective. [Tr 1/29/09, p 14.]

Mr. Sandberg acknowledged that his mother, Linda Sandberg, who also signed the fee agreement, paid the respondent. (Tr 1/29/09, p 14). Through his mother, Mr. Sandberg provided respondent with a copy of the motion he had drafted while incarcerated. (Tr 1/29/09, p 15). The substance of that motion centered on the argument that because Mr. Sandberg was on Prozac and Depakote, his plea in 1996 was not voluntary. (Tr 1/29/09, p 49).

Within 30-60 days of signing the fee agreement, respondent and Mr. Sandberg met for the first time at the correctional facility housing Mr. Sandberg. The meeting lasted approximately two hours and during this time they discussed legal strategy. (Tr 1/29/09, pp 14-15). They specifically discussed gathering extra evidence to support the “incompetence to stand trial” theory related to the Prozac Mr. Sandberg was taking at the time he entered his plea. (Tr 1/29/09, pp 15-16). According to Mr. Sandberg, respondent was against arguing this theory and wanted more evidence to support it. (Tr 1/29/09, p 15).

Over the next three years, respondent met with Mr. Sandberg 5-7 times, the meetings lasting one to two hours. (Tr 1/29/09, p 41). Each time, the discussion was always the same: the strategy they had contemplated at their original meeting. (Tr 1/29/09, pp 16-17). Between visits, Mr. Sandberg wrote approximately ten letters to respondent to discuss legal strategy. (Tr 1/29/09, p 18). Respondent replied to one of these letters assuring Mr. Sandberg that “they weren’t at a standstill. That we were moving forward and a Motion would be filed eventually.” (Tr 1/29/09, p 18). Respondent repeatedly assured Mr. Sandberg that a motion would be filed “in the next three months.” When that time would elapse, respondent would make the representation again. (Tr 1/29/09, pp 19-20). Finally, in January of 2006, Mr. Sandberg wrote to respondent indicating that he either wanted the motion filed or the money and paperwork returned to Linda Sandberg. (Tr 1/29/09, p 20). Mr. Sandberg filed the grievance against respondent in June of 2006. (Tr 1/29/09, p 21).

After filing his grievance, Mr. Sandberg rewrote the motion for relief from judgment that he had originally drafted and filed it with the court in November of 2006. That motion was denied in April of 2007. (Tr 1/29/09, p 21). Mr. Sandberg testified that respondent has not refunded any of the legal fees paid. (Tr 1/29/09, p 23).

On cross-examination, Mr. Sandberg acknowledged that respondent visited him three times while he was incarcerated in correctional facilities located in the Upper Peninsula. (Tr 1/29/09, p 27). Mr. Sandberg further acknowledged that the fee agreement did not say who would write the motion. When asked why, Mr. Sandberg explained:

Because the Motion had already been written by myself. [Tr 1/29/09, p 38.]

Respondent then asked Mr. Sandberg if he had been retained to write the motion for him; Mr. Sandberg replied: “No.” (Tr 1/29/09, p 39). Mr. Sandberg acknowledged that respondent was to help Mr. Sandberg with his motion. (Tr 1/29/09, p 41).

On continued cross-examination, Mr. Sandberg testified that he did not recall directing respondent to obtain the expert opinion of Dr. Jonathan Himmelhoch to support his motion. (Tr 1/29/09, p 45). However, he acknowledged that he would have been in agreement with respondent getting information to support his motion and that he gave him permission to seek expert testimony. (Tr 1/29/09, p 46).

Mr. Sandberg also acknowledged that the motion he eventually filed himself in 2006 was different from the draft of the motion that he had given to respondent to review in 2003. Mr. Sandberg admitted that he might have used some of respondent's advice when he rewrote the motion. (Tr 1/29/09, pp 68-69).

When the hearing resumed on April 28, 2009, petitioner called Linda Sandberg to testify. Ms. Sandberg testified that she retained respondent in May of 2003 because she "wanted him to assist [her] son in clarifying and preparing a 6500 Motion for court." Only when she was asked to repeat her answer did she add: "I wanted him to assist my son and file for him a 6500 Motion." (Tr 4/28/09, p 9). Ms. Sandberg explained that after a couple of years, she did ask respondent when he was going to file the motion. Respondent would tell her in "three month increments" down the road. (Tr 4/28/09, p 11).

On cross-examination, Ms. Sandberg admitted that respondent drove with her to the Upper Peninsula three times to meet with her son. (Tr 4/28/09, pp 18-19). Ms. Sandberg also testified that there were 10-12 other meetings between her and respondent. (Tr 4/28/09, pp 53-54).

Respondent's witness Jonathan Himmelhoch, M.D. testified via speakerphone. (Tr 4/28/09, p 61). The parties stipulated that Dr. Himmelhoch was an expert in psychiatry. Respondent met personally with Dr. Himmelhoch at his home office in Pennsylvania to discuss Mr. Sandberg's circumstances. (Tr 4/28/09, p 64). Although Dr. Himmelhoch had never met the Sandbergs, it was his belief that he was being asked by Ms. Sandberg to assess the impact of a couple of medications on Brian Sandberg's clarity of thought. (Tr 4/28/09, pp 65, 70). After reviewing Mr. Sandberg's records, Dr. Himmelhoch opined that neither Prozac nor Depakote would have lowered "the level of consciousness." (Tr 4/28/09, p 66). Dr. Himmelhoch testified that Linda Sandberg paid him, and he recalled writing a receipt to Ms. Sandberg in the amount of \$400.00. (Tr 4/28/09, p 68).

Respondent testified that in March 2003 he reviewed a motion drafted by Brian Sandberg. Linda Sandberg then hired him in May 2003. (Tr 4/28/09, p 74). Respondent explained the scope of the services he was hired to render:

At the time of the agreement, what was my assignment? My assignment, and she specifically emphasized this, was to assist her son who she was very impressed with his abilities. She wanted to help him in two ways. The first was to assist him in filing the motion. It was to assist in terms of advising him. And he was the person who was to file it or authorize the filing.

Number two, specifically, her second motive for having me involved in the case was because she was afraid that her son was going to lose his mind. So I was to assist in actually helping him keep his balance. But it was to be done through advising him with regards to the motion.

Why did she specifically state it that way? It was because there was a time factor for his first parole hearing, his parole department hearing. It was not going to occur for about, oh, two to three years. This was stated at the time of the fee agreement. [Tr 4/28/09, p 75.]

Respondent acknowledged that it was unlikely that Mr. Sandberg was aware that the alternative purpose for respondent's assistance was to keep him focused, stating that this was more of an understanding between respondent and Ms. Sandberg. (Tr 4/28/09, p 76). Respondent testified that he would visit Mr. Sandberg and "rework" his motion, give him advice on what to improve, all with the understanding that it was Mr. Sandberg's responsibility to file it. (Tr 4/28/09, p 77). Respondent noted that he met with Brian Sandberg six or seven times and he had no less than 30 conversations with Linda Sandberg. (Tr 4/28/09, p 79).

On cross-examination, respondent admitted that he did not provide an accounting to either Linda or Brian Sandberg but explained that this was unnecessary because he was charging a flat fee. (Tr 4/28/09, p 81). Respondent denied that he never drafted a motion, explaining that he had "personally toyed with various versions of a draft." (Tr 4/28/09, p 82). When asked when a motion on Brian Sandberg's behalf was to be filed, respondent replied, "whenever Brian himself was satisfied with my advice." (Tr 4/28/09, p 84). Respondent believed that Mr. Sandberg finally filed the motion because he had gotten all the information he desired from respondent. (Tr 4/28/09, p 84).

Tri-County Hearing Panel # 17 issued its report on June 3, 2009, finding that there was insufficient evidence to conclude that respondent had neglected a legal matter or violated any other rule of professional misconduct alleged in the formal complaint. (The panel's report is attached to this opinion.) The panel specifically noted testimony that respondent was not hired to file the motion, but was retained to help Mr. Sandberg edit a motion for relief from judgment that he had already written. The panel also relied upon respondent's testimony regarding his discussions with Linda Sandberg to the effect that she wanted her son to file the motion himself because the work he was doing on his own behalf was essential to his well being during his incarceration. The panel found that respondent had performed a multitude of services, including, making several trips to the

Upper Peninsula for meetings with his client, reviewing the brief drafted by Mr. Sandberg and the legal arguments and cites contained therein, and meeting with Dr. Himmelhoch in Pittsburgh.

II. Discussion

Charges of professional misconduct in a discipline proceeding must be established by a preponderance of the evidence. MCR 9.115(J). In this case, the panel found that the Grievance Administrator had not met that burden of proof. In reviewing a hearing panel's 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 (1990). The Board does not conduct a de novo review of the factual findings nor does it substitute its own judgment for the judgment and credibility determinations of the panel. *Grievance Administrator v George T. Krupp*, 96-287-GA (ADB 2002).

In reaching its decision, the panel cited Mr. Sandberg's testimony that respondent had been retained for the purposes of "helping him edit the motion for relief in [sic] judgment that [he] had already written." However, that was not the only evidence relied upon by the panel. The panel noted that both respondent and Linda Sandberg testified similarly. While the Administrator argues that both of the Sandbergs also testified that it was their belief that respondent was hired to file the brief as well, it is noted that in several instances the witnesses testified in this manner after additional probing or when they were prompted to repeat their answer. (See e.g., Tr 1/29/09, pp 14, 63; Tr 4/28/09, p 9). The panel was free to reject the Sandbergs' testimony, in whole or in part. Because the hearing panel has the opportunity to observe the witnesses during the testimony, this Board has said that it will defer to the panel's assessment of demeanor and credibility. *Grievance Administrator v Edgar J Dietrich*, 99-145-GA (ADB 2001).

Nor is the language of the fee agreement (Petitioner's Exhibit 1) at odds with the panel's findings. The agreement simply provides that respondent would be representing Brian Sandberg in the following "matter": "§ 6500 Motion." The agreement does not specify who would draft or file the motion for relief from judgment.

The record discloses that Brian Sandberg's conduct during the years of his incarceration is not inconsistent with the conclusion that he sought respondent's legal advice, but at the end of the day, he was driving the process. In 2002, Mr. Sandberg sought the assistance of the State Appellate Defender Office (SADO). In response, SADO sent a correspondence to Mr. Sandberg providing

suggestions and guidance with respect to legal issues he might raise in a motion. (Exhibit 10, SADO correspondence.) After that, Mr. Sandberg researched and drafted a lengthy motion which was provided to respondent for his review. In an undated correspondence from Mr. Sandberg to respondent, Mr. Sandberg set out a legal theory he wished to pursue in the motion. At one point, Mr. Sandberg wrote: "I ask that you research this theory and let me know if the data squares nicely or ruins the whole idea." (Exhibit 4; Undated handwritten correspondence from Brian Sandberg to respondent.) It is clear that while incarcerated, Brian Sandberg spent a great deal of time engaged in this process of drafting and redrafting the motion and that, while respondent was to provide assistance, Ms. Sandberg made it clear to respondent that her son was to remain in control of the process.

The Administrator argues that even if respondent was not retained to file the motion on Brian Sandberg's behalf, he nevertheless failed to "assist" Mr. Sandberg. While the Administrator acknowledges that respondent met with Brian Sandberg in the Upper Peninsula, conferred with an expert in Pennsylvania and communicated with Linda Sandberg frequently, he takes issue with the panel's finding that respondent checked legal arguments and cases cited in the brief drafted by Brian Sandberg.

Again, it is not the Board's role on review to weigh the evidence presented to the panel; rather, the Board must determine whether there is evidentiary support for the panel's findings. Respondent presented this testimony to the panel:

MR. DOUGLAS: Yeah, specific cases. We discussed a lot of the cases. Sir, if I may, the difference between what Linda does not know is that Brian and I had a difference of where the motion should be directed to. I simply lost his -- I guess his approval, because I advised him, if you file this motion on the basis of Strickland, Apendi and all of these cases that you think should be filed on the basis of misrepresentation of attorney, his attorney, he felt, did not adequately represent him.

I told him, if you do that your going to fail and your going to fail for one reason. And that's the one reason he would never admit to or acknowledge. And that is, if you take a shotgun, point it at a person's head and fire it, and then you enter a guilty plea on that basis, there is only one way you're going to effectively get out of this and we're going to have to delve into your assertion of bipolar and ADHD.

* * *

And from that point, we took two entirely different directions. I advised him not to file on the basis of those cases. And I went through all of those cases with him to show him it still will not get you around the voluntary plea issue. You're going to have to direct it – you're going to have to argue it directly. And you're only going to get around it, you're going to have to break new ground, because there really are no cases that rule in your favor. [Tr 4/28/09, pp 87-88.]

We find adequate evidentiary support in the record for the panel's finding that respondent reviewed legal authority with Mr. Sandberg. Similarly, there is support in the record for the panel's finding that respondent aided Mr. Sandberg by procuring an expert to review a possible claim of impairment at the time of sentencing.

III. Conclusion

The record as a whole in this case would permit a finder of fact to conclude that respondent was retained to assist Brain Sandberg in his preparation of a motion for relief from judgment and that in furtherance of that endeavor, respondent performed services and earned the fee paid by Linda Sandberg. The question before the Board is not whether there is evidentiary support for the Grievance Administrator's position but whether the record as a whole is devoid of evidence upon which the hearing panel could have made its findings. We conclude that the answer to that question is no and the hearing panel order of dismissal is therefore affirmed.

Board members William J. Danhof, Thomas G. Kienbaum, William L. Matthews, Andrea L. Solak, Rosalind E. Griffin, M.D., Carl E. Ver Beek, Craig H. Lubben, and Sylvia P. Whitmer concur in this decision.

Board Members James M. Cameron, Jr. did not participate.