

STATE OF MICHIGAN
Attorney Discipline Board

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ATTORNEY DISCIPLINE BOARD
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Grievance Administrator,

Petitioner/Appellee

v

Scott D. Norton, P 35717,

Respondent/Appellant,

Case No. 18-6-GA

Decided: February 4, 2020

Appearances

Nathan C. Pitluk, for the Grievance Administrator, Petitioner/Appellee
Drew S. Norton, for Respondent/Appellant

BOARD OPINION

Tri-County Hearing Panel #10 of the Attorney Discipline Board issued an order on June 14, 2019, suspending respondent's license to practice law in Michigan for a period of 60 days, and ordering him to pay \$1,500 in restitution. Respondent filed a timely petition for review and a request for a stay, which resulted in an automatic stay of the hearing panel's order. On review, respondent requested that the Board reduce the discipline imposed by the hearing panel to a reprimand and restitution. The Grievance Administrator requested that the Board affirm the hearing panel's order of suspension and restitution.

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 on October 16, 2019. For the reasons discussed below, we affirm the hearing panel's order of suspension and restitution in its entirety.

I. Panel Proceedings/Background

The Grievance Administrator filed a formal complaint against respondent on January 9, 2018. The complaint involved respondent's representation of Martin Lemieux in a driver's license appeal to circuit court after Mr. Lemieux received an unworkable decision from the Secretary of State in his driver's license appeal. Although Mr. Lemieux was successful in getting his driver's license modified from being revoked to restricted, the modification was conditioned upon proof that an ignition interlock system was installed on his vehicle and used during the restricted time period. Mr. Lemieux has a medical condition that prevented him from using the interlock system he was ordered to use. Mr. Lemieux paid respondent \$1,500 for the representation.

The formal complaint alleged that, during the course of this representation, respondent neglected the matter (MRPC 1.1(c)), failed to seek the lawful objectives of the client by failing to file an actual appeal (MRPC 1.2(a)), failed to act with reasonable diligence and promptness (MRPC 1.3), failed to keep Mr. Lemieux reasonably informed about his case (MRPC 1.4(a)), failed to sufficiently explain the matter to Mr. Lemieux (MRPC 1.4(b)), failed to refund an unearned portion of an advance fee (MRPC 1.16(d)), violated or attempted to violate the Rules of Professional Conduct (MRPC 8.4(a)), and engaged in conduct involving dishonesty, fraud, deceit or misrepresentation (MRPC 8.4(b)). It was also alleged that respondent's conduct was prejudicial to the administration of justice, constituted conduct that exposes the legal profession to obloquy, contempt, censure or reproach, and was contrary to justice, ethics, honesty or good morals (MCR 9.104 (1)-(3)).

Respondent filed a timely answer to the complaint, denying that he committed misconduct as charged in the formal complaint. Specifically, respondent stated that the \$1,500 he received was a nonrefundable flat fee, and that he had some difficulty communicating with Mr. Lemieux during the representation. Respondent further relied on his answer to Mr. Lemieux's request for investigation, which he attached to his answer to the formal complaint.

The matter was assigned to Tri-County Hearing Panel #10 and a hearing on misconduct was held on August 14, 2018. Both Mr. Lemieux and respondent testified at the hearing and both parties presented a number of exhibits that were admitted into the record. At the conclusion of the hearing, the panel advised the parties on the record that they had concluded that misconduct had been

established and that a written report to that effect would subsequently be issued. (Tr 8/14/18, pp 80-81.)

On November 15, 2018, the panel's misconduct report was issued. In the report, the panel made the following findings:

We find that respondent neglected a legal matter entrusted to him, in violation of MRPC 1.1(c); failed to seek the lawful objectives of the client, in violation of MRPC 1.2(a); failed to act with reasonable diligence and promptness, in violation of MRPC 1.3; failed to keep a client reasonably informed about the status of the matter, in violation of MRPC 1.4(a); failed to explain a matter to the extent reasonably necessary to make informed decisions regarding the representation, in violation of MRPC 1.4(b); and violated or attempted to violate the Rules of Professional Conduct, in violation of MRPC 8.4(a).

Specifically, the hearing panel finds that respondent neglected Mr. Lemieux's file; failed to file an appeal in the Circuit Court after nearly a year, thereby failing to seek the objectives of Mr. Lemieux and failing to act promptly; and failed to adequately communicate and explain the status of the case to Mr. Lemieux throughout the representation.

However, the hearing panel finds that the Grievance Administrator did not establish the following allegations: that respondent failed to refund the unearned portion of an advance fee, in violation of MRPC 1.16(d); engaged in conduct involving dishonesty, fraud, deceit, misrepresentation, where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer, in violation of MRPC 8.4(b); engaged in conduct prejudicial to the proper administration of justice, in violation of MCR 9.104(1); engaged in conduct that exposes the legal profession or the courts to obloquy, contempt, censure or reproach, in violation of MCR 9.104(2); and engaged in conduct that is contrary to justice, ethics, honesty, or good morals, in violation of MCR 9.104(3), as charged in paragraphs 27(f),(h),(i), (j) and (k) of the formal complaint. [Misconduct Report 11/15/18, p 4.]

The parties next appeared before the panel on February 26, 2019, for a hearing on sanction. No witnesses were called by either party and the only exhibit offered was of respondent's prior disciplinary history. (Petitioner's Exhibit 17.) Counsel for the Administrator referred the panel to

ABA Standard 4.42¹ and argued that the applicable aggravating factors included prior disciplinary offenses (9.22(a)); dishonest or selfish motive (9.22(b)); and vulnerability of the victim (9.22(h)). Counsel also argued in aggravation that respondent failed to provide full and free disclosure and did not show sufficient remorse. Finally, counsel requested that the panel impose a 90-day suspension of respondent's license to practice law and order restitution totaling \$1,826.50 to Mr. Lemieux. (Tr 2/26/19, pp 15, 20-23.)

Prior to the sanction hearing, respondent's counsel filed a sanction brief in which he cited ABA Standards 4.4 (lack of diligence) and 4.6 (lack of candor), as the standards to apply, specifically arguing that the panel consider ABA Standard 4.43 (reprimand) and 4.44 (admonishment), and ABA Standard 4.63 (reprimand) and 4.64 (admonishment).² The brief further cited in mitigation, ABA Standards 9.32(b) (absence of a selfish motive); 9.32(e) (full and free disclosure to disciplinary board or cooperative attitude toward proceedings); 9.32(l) (remorse); and, 9.32(m) (remoteness of prior offenses). Respondent's brief acknowledged that the hearing panel could not impose an admonishment, and cited two prior panel decisions in matters with similar underlying facts in which reprimands were imposed: *Grievance Administrator v Richard C. Holst*, 00-15-GA; and, *Grievance Administrator v Jerold C. Smith*, 92-279-GA. Respondent's brief requested that the panel issue an order imposing a "condition of continuing legal education or such other appropriate condition." Respondent's counsel argued consistently with the sanction brief at the sanction hearing urging the

¹ ABA Standard 4.42 states: "suspension is generally appropriate when a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client."

² ABA Standards 4.43, 4.44, 4.63, and 4.64 state:

4.43 - Reprimand is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes injury or potential injury to a client;

4.44 - Admonition is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes little to no actual or potential injury to a client;

4.63 - Reprimand is generally appropriate when a lawyer negligently fails to provide a client with accurate or complete information, and causes injury or potential injury to the client;

4.64 - Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in failing to provide a client with accurate or complete information, and causes little to no actual or potential injury to the client.

panel to consider respondent's conduct negligent rather than knowingly or intentional. Counsel further argued that any injury to Mr. Lemieux was minimal as he had a driver's license the whole time and that respondent's fee was earned and not refundable. (Tr 2/26/19, pp 24-26, 28.)

On June 14, 2019, the hearing panel issued its sanction report, which made the following findings:

We agree with the Administrator's counsel that a suspension as set forth in ABA Standard 4.42, is appropriate. As for applicable aggravating factors under ABA Standard 9.22, we find the following are applicable: 9.22(a) (prior disciplinary offenses), 9.22 (b) (dishonest or selfish motive); and, 9.22(h) (vulnerability of victim). We further agree with counsel that respondent did not provide full and free disclosure and has not shown sufficient remorse for his actions. We do not find any of the mitigating factors cited by respondent's counsel applicable or otherwise persuasive.

As for the issue of restitution, we find that it is appropriate to order respondent to refund the entire fee, \$1,500, to his client as respondent clearly provided no discernable services to warrant his entitlement to the fee. We do not agree that the cost of obtaining the transcript should be refunded as the transcript was in fact obtained. Thus, we will not include the cost of the transcript in the amount ordered to be paid as restitution.

After considering all of the above, the panel will order that respondent's license to practice law in Michigan be suspended for 60 days and that he pay restitution totaling \$1,500 to Martin Lemieux. [Sanction Report 6/14/19, p 3.]

II. Discussion

On review, respondent argues that the suspension of his license was inappropriate because "the record is devoid of any evidence that respondent knowingly failed to perform services for his client," and because "the hearing panel specifically found only "neglect," which respondent argues equates to a negligent state of mind. Our review of the record below indicates that it is replete with evidence that respondent knowingly neglected Mr. Lemieux's matter and knowingly failed to adequately communicate with him regarding the status of his matter. However, no showing of knowing or intentional conduct was necessary to make such a finding. See *Grievance Administrator*

v Bruce Sage, 96-35-GA (ADB 1997).

It is clear from the record below, that on March 6, 2016, Martin Lemieux appeared for a driver's license appeal hearing with the Secretary of State in an attempt to have his license reinstated after it had been revoked. Although the Secretary of State decision modified his license from revoked to restricted, it required Mr. Lemieux to install an ignition interlock system on his vehicle. However, Mr. Lemieux suffered from a medical condition that rendered him unable to summon enough breath to use the interlock system he was ordered to place on his vehicle. Thus, he effectively could not drive his vehicle although the status of his driver's license had changed. Mr. Lemieux hired respondent shortly thereafter to file an appeal in the circuit court and paid him \$1,500 on March 28, 2016. (Tr 8/14/18, p 19; Petitioner's Exhibit 2.)

It is undisputed that the statute that applied to Mr. Lemieux's situation was MCL 257.323, which states in relevant part:

A person aggrieved by a final determination of the secretary of state. . .restricting an operator's. . . license. . .may petition for review of the determination in the circuit court. . .The person shall file the petition within 63 days after the determination is made except that for good cause shown the court may allow the person to file a petition within 182 days after the determination is made.

Based on the above-referenced statute, respondent had until May 13, 2016 to file the appeal, or until September 9, 2016, if good cause was shown. Respondent testified at the misconduct hearing that he misunderstood the deadlines set forth in the above-referenced statute.³ (Tr 8/14/18, p 53.) He testified that although he knew the deadline for filing an appeal was 63 days from the date of determination or 182 days for good cause, he thought the 182 days ran from when there was a determination of good cause. (Tr 8/14/18, p 53.) Respondent acknowledged that he never mentioned a time line to Mr. Lemieux, because he assumed they would be asserting good cause.⁴ (Tr 8/14/18, p 55.)

Respondent ordered the transcript from Mr. Lemieux's hearing and a copy of Mr. Lemieux's driving record on April 21, 2016, and sought and received payment of \$326.50 from Mr. Lemieux.

³ This defense appears to have been raised for the first time at the hearing, as it was not mentioned in respondent's answer to the request for investigation or to the formal complaint.

⁴ Respondent never explained why he assumed they would assert good cause, or what that good cause would be.

(Respondent's Exhibits A and B; Petitioner's Exhibit 2.) At the time he was retained, Mr. Lemieux gave respondent a letter dated January 9, 2014, from his doctor that explained Mr. Lemieux's breathing issues. The records indicate that respondent received Mr. Lemieux's driving record on April 25, 2016 and received the transcript on or about June 20, 2016, as that is the date he forwarded a copy to Mr. Lemieux. (Respondent's Exhibit C; Respondent's Answer.) It thus would appear that respondent had everything needed to proceed with the appeal as of June 20, 2016. However, as of that date, respondent had not yet filed anything on Mr. Lemieux's behalf, even to attempt to establish good cause as he was now beyond the standard 63 day time frame set forth in the statute.

The record reflects that respondent did nothing further beyond preparing an affidavit for Mr. Lemieux to sign in January 2017. In the meantime, the record shows a series of attempts by Mr. Lemieux to contact respondent, between May 2016 and April 2017, to determine what was going on with his appeal and a blatant disregard by respondent to even respond. (Petitioner's Exhibits 5, 6, 8, 9, 11, 12, and, 14; Respondent's Exhibit D.)

A review of the above-referenced exhibits clearly show that Mr. Lemieux was growing very frustrated at his inability to use his vehicle, although he now had a restricted driver's license, and respondent's failure to respond to him. In February of 2017, almost a year after respondent was retained, Mr. Lemieux, on his own, found a different company to install an ignition lock system that he could operate, despite his health issues. (Tr 8/14/18, p 31.) No longer needing respondent's assistance to be able to drive his vehicle, Mr. Lemieux requested that respondent return his documents and refund all of the funds paid to him for the representation. Respondent sent Mr. Lemieux his file, but did not return any of the funds.

Simply put, the record in this matter sets forth sufficient facts from which respondent's indifference to Mr. Lemieux's matter could easily be inferred. Moreover, respondent clearly failed to act with reasonable diligence (MRPC 1.3) and failed to pursue his client's lawful objectives (MRPC 1.2(a)). It was not necessary for the hearing panel to find that respondent's actions were "willful" or that he "acted knowingly" in order to find that he engaged in neglect under MRPC 1.1(c). The question is whether, under all of the facts and circumstances, respondent proceeded with reasonable diligence and promptness and/or whether respondent's failure to act amounted to neglect. *Grievance Administrator v David H. Fried*, 94-223-GA (ADB 1997). Here, the answer, based on the evidence presented, is clearly no and yes, respectively. That, coupled with the number of

applicable aggravating factors, leads to no other conclusion that the panel appropriately applied the suspension standard found in ABA Standard 4.42 to its findings of misconduct.

III. Conclusion

Upon careful consideration of the whole record, the Board is not persuaded that the hearing panel's decision to order a 60-day suspension with restitution was inappropriate. We therefore affirm the hearing panel's order in its entirety.

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

Board member John W. Inhulsen was absent and did not participate