STATE OF MICHIGAN

Attorney Discipline Board

FILED ATTORNEY DISCIPLINE BOARD
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Grievance Administrator,

Petitioner/Appellee,

v

Mark T. Light, P-16673,

Respondent/Appellant,

Case Nos. 98-198-GA

Decided: AUG 23 2001

BOARD OPINION

On September 12, 2000, Ingham County Hearing Panel #7 of the Attorney Discipline Board issued an order suspending the license of respondent, Mark T. Light, for a period of 30 days. The respondent filed a timely petition for review and petition to stay discipline. The suspension ordered by the hearing panel was automatically stayed in accordance with MCR 9.115(K). The Attorney Discipline Board has conducted review proceedings in accordance with MCR 9.118 which included review of the record below and consideration of the briefs and arguments presented by the parties.

For the reasons discussed below, we affirm the hearing panel's findings and conclusions as to misconduct but modify the discipline imposed by reducing it to a reprimand.

Although the hearing panel concluded that certain charges in the formal complaint were not established by a preponderance of the evidence, the panel found that respondent's failure to clear up his clients' misunderstandings regarding their obligations under a fee agreement and his failure to otherwise adequately communicate with them violated MRPC 1.4 and MCR 9.104(4). The panel further found that respondent's failure to disclose facts to the Grievance Administrator necessary to correct a misapprehension together with respondent's multiple, conflicting explanations of the circumstances surrounding the deposit of $5,000 received from his client violated MRPC 8.1(b) and 8.4(b).

To the extent that the respondent's petition for review generally states a claim that the hearing panel's findings were without proper evidentiary support, we reject that claim. On the contrary, review of the record persuades us that there is substantial evidentiary support for the detailed findings of fact and conclusions of law set forth in the hearing panel's report filed January 17, 2000.

The respondent's brief, however, frames the issues before the Board in somewhat different terms and those issues are addressed in turn.

Issue 1: Do the Rules of Professional Conduct require a fee agreement to be in writing?

The hearing panel found, unequivocally, that "Michigan Rule of Professional Conduct 1.15 does not require written fee agreements (except in the case of contingency fees), but only states a preference for written fee agreements." Hearing Panel report 01/17/00 p 13. We are not persuaded by respondent's argument that the hearing panel nevertheless created a *de facto* requirement that fee agreements be in writing in its observation that there was some "confusion" between respondent and his clients as to the exact nature of their financial arrangement and that this confusion could have been avoided if respondent had put the financial agreements in writing. That observation (which is well supported by the evidence) is not a crucial component to the panel's finding that respondent's failure to provide sufficient information to his clients about the fee arrangement constituted a violation of respondent's duty under MRPC 1.4 to keep a client reasonably informed about the status of the matter, to comply promptly with reasonable requests for information, and to explain a matter "to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

Issue 2: Did respondent mislead the Attorney Discipline Board [sic]?

We can only assume that respondent meant to refer to the Attorney Grievance Commission. Respondent states in his brief, at p 12, "There is no dispute that twice, Mr. Light's attorneys incorrectly represented the facts based on the suspect records." The panel found that respondent did not actively mislead the Attorney Grievance Commission but that respondent violated MRPC 8.1 which states that in connection with a disciplinary matter, a lawyer shall not:

> Fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter . . .

There was adequate evidentiary support in the record for the panel's conclusion that respondent did not assume sufficient responsibility under the circumstances to provide timely, accurate information, to the Grievance Administrator and the Attorney Grievance Commission, or at least to correct any misapprehension caused by the admitted submission of inaccurate information.

Issue 3: Can the panel delegate to the attorney for the Grievance Commission the decision as to punishment?

During the separate hearing on discipline mandated by MCR 9.115(J)(2), the Grievance Administrator's counsel offered evidence that respondent had been admonished in 1988 and reprimanded by consent in 1995. The panel's consideration of respondent's prior misconduct was proper. See MCR 9.115(J)(3). There is no apparent basis for respondent's assertion that the hearing panel "delegated" any portion of its decision to the attorney for the Grievance Administrator.

Level of Discipline

Underlying the respondent's arguments to the Board on review is his argument that a reprimand, rather than a suspension is the appropriate level of discipline in this case. Upon application of the American Bar Association's Standards for Imposing Lawyer Sanctions, we agree.

In Grievance Administrator v Lopatin, 462 Mich 235; 612 NW2d 120 (2000), the Supreme Court directed the Board and hearing panels to employ the American Bar Association (ABA) Standards for Imposing Lawyer Sanctions in determining the appropriate level of discipline. In Lopatin, the Court summarized the Standards' theoretical framework for deciding the level of discipline to be imposed after a finding of misconduct.

The inquiry begins with three questions:

(1) What ethical duty did the lawyer violate? (A duty to a client, the public, the legal system or the profession?)

(2) What was the lawyer's mental state? (Did the lawyer act intentionally, knowingly, or negligently?)

(3) What was the extent of the actual or potential injury caused by the lawyer's conduct? (Was there a serious or potentially serious injury?)

Lopatin, 462 Mich at 239-240 (quoting ABA Standards, p 5).

Next, the sanctioning body examines recommended sanctions based the answers to these questions. Lopatin, 462 Mich at 240; ABA Sanctions, pp 3, 4-5.

Then, aggravating and mitigating factors are considered. Id.

And, in Michigan, the final step of the process involves a consideration of other factors, if any, which may make the results of the foregoing analytical process inappropriate for some articulated reason. As the Court explained in directing this Board and the panels to follow the Standards:

> We caution the ADB and hearing panels that our directive to follow the ABA Standards is not an instruction to abdicate their responsibility to exercise independent judgment. Where, for articulated reasons, the ADB or a hearing panel determines that the ABA Standards do not adequately consider the effects of certain misconduct, do not accurately address the aggravating or mitigating circumstances of a particular case, or do not comport with the precedent of this Court or the ADB, it is incumbent on the ADB or the hearing panel to arrive at, and explain the basis for, a sanction or result that reflects this conclusion. [Lopatin, 462 Mich at 248 n 13.]

The ethical duties at issue in this case are respondent's duties to keep his clients reasonably informed regarding their obligations under a fee agreement and to explain the matter to the extent reasonably necessary to clear up the clients' confusion regarding that agreement (MRPC 1.4), and his obligation in his communications with the Attorney Grievance Commission to disclose facts necessary to correct a misapprehension (MRPC 8.1). Under MRPC 1.4, respondent had a duty to

his clients; under MRPC 8.1 and 8.4(b), the duty was owed to the legal system and the legal profession. With respect to both counts, respondent's conduct resulted in actual or potential injury to the client and the legal system. In this case, the determinative factor appears to be the respondent's mental state.

Appendix 1 to the ABA Standards for Imposing Lawyer Sanctions is a cross reference table between the ABA Model Rules of Professional Conduct (upon which the Michigan Rules of Professional Conduct are largely based) and the ABA Standards for Imposing Lawyer Sanctions. Under that cross reference table, a violation of Rule 1.4 (failure to communicate) would generally be analyzed under ABA Standard 4.4 (Lack of Diligence). In his arguments to the hearing panel, the Grievance Administrator's counsel suggested analysis under ABA Standard 4.6 (Lack of Candor) and this was the standard cited by the hearing panel in its report on discipline. In light of the panel's conclusion that the respondent's clients suffered from a "misunderstanding" which respondent failed to correct, we agree with the Administrator and the hearing panel that the appropriate presumptive sanction is found under ABA Standard 4.62 or Standard 4.63, which provide:

> 4.62 Suspension is generally appropriate when a lawyer knowingly deceives a client, and causes injury or potential injury to the 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.

With regard to respondent's violations under MRPC 8.1 and 8.4(b), Appendix 1 to the ABA Standards suggests application of either Standard 5.1 (Failure to Maintain Personal Integrity) or Standard 7.0 (Violations of Duties Owed to the Profession). The Administrator's counsel, however, suggested to the panel that application of Standard 6.1 (False Statements, Fraud and Misrepresentation) was appropriate in this case. Again, the hearing panel followed that recommendation and, again, we agree with the panel's use of that standard.

ABA Standard 6.12 provides:

> Suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.

ABA Standard 6.13 provides:

> Reprimand is generally appropriate when a lawyer is negligent either in determining whether statements or documents are false or in taking remedial action when material information is being withheld, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.

As applied to the facts of this case, the differentiating factor under both standards is whether a respondent's conduct may be characterized as "knowing" or "negligent."

We have carefully reviewed the hearing panel's report on misconduct in this case. The hearing panel's findings and conclusions with regard to both Counts 1 and 2 are based upon express or implied findings that the respondent's conduct was more accurately described as "negligent" than "knowing."

With regard to the respondent's failure to clarify his clients' misunderstanding as to the fee agreement, for example, the panel noted:

> In the context of this proceeding, the respondent may well have intended that the $5,000 he received in July 1995 was received as a nonrefundable retainer. However, there is nothing in writing to support that understanding. In fact, documents from respondent's office identify that sum as attorney fees or costs in the state case. The Donally's could easily misunderstand what the nature of the payment was. The respondent must take responsibility for ambiguity which he could have resolved.
>
> This panel believes that the respondent intended to enter into a nonrefundable retainer agreement for the $5,000 received in July of 1995. This panel also believes that the clients were confused about what the $5,000 was supposed to be for. This confusion was fueled by the respondent's failure to put the financial arrangements in writing.
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> * * *
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> Assuming the $5,000 payment was truly a nonrefundable retainer received for legal services, then it was incumbent upon the respondent to correct the misunderstanding his clients had concerning what that $5,000 was to be used for. To allow this misunderstanding to continue without correspondence from the respondent setting the record straight under these circumstances violates MRPC 1.4. [Hearing panel report 01/17/01 pp 15-17.]

Similarly, the hearing panel's conclusions with regard to the differing statements provided to the Grievance Administrator, with regard to the deposit of the clients' funds point to respondent's negligence in failing to correct the resulting misapprehension on behalf of the petitioner rather than to a knowing intent to provide false information or to create the misapprehension in the first place.

In its findings and conclusions as to Count 2, the panel noted that correspondence was sent to the Grievance Administrator on June 29, 1998 on respondent's behalf by his first attorney; that another version was submitted to the Commission on July 23, 1998 by respondent's second attorney; and that by the time of the hearing in May 1999, the respondent had "distanced himself" from the second letter. The panel concluded:

> MRPC 8.1 prohibits a lawyer in connection with a disciplinary matter from failing to disclose facts necessary to correct a misapprehension. This panel finds that the respondent violated MRPC 8.1(b) in that he did not disclose facts, in a timely

> fashion, necessary to correct a misapprehension on behalf of the petitioner. Once this grievance procedure began, respondent had a duty to locate the records concerning his trust and business accounts and to accurately disclose the whereabouts of the $5,000. The multiple versions of what the facts are concerning the deposit of the $5,000 could certainly cause a misunderstanding on behalf of the petitioner and thus a violation of MRPC 8.4(b). [Hearing panel report 01/17/01 p 19.]

We acknowledge the hearing panel's reference in its report on discipline filed September 12, 2000 that both Standards 4.62 and 6.12 suggest that a suspension, rather than a reprimand, is generally appropriate when false or inaccurate information is provided to a client or a tribunal where there is an element of knowledge on the attorney's part rather than mere negligence. Nevertheless, considering the record as a whole, and attempting to reconcile that statement with the somewhat more detailed findings in the report on misconduct, we are persuaded that respondent's misconduct in this case is characterized more accurately as the type of negligent conduct for which reprimand would be appropriate.

We agree with the hearing panel that neither the aggravating nor mitigating factors discussed in the panel's report on discipline should be afforded significant weight. Nor do the facts and circumstances in this case place it within a distinct category of cases governed by precedent of the Board or the Supreme Court.

On balance, therefore, based upon our review of the whole record and our application of the American Bar Association's Standards for Imposing Lawyer Sanctions, we affirm the hearing panels' findings and conclusions with regard to the established misconduct but modify the discipline imposed by reducing discipline to a reprimand.

Board members Wallace D. Riley, Theodore J. St. Antoine, Michael R. Kramer, Nancy Wonch, Grant J. Gruel, Diether H. Haenicke, Ronald L. Steffens, Marsha M. Madigan, M.D., and Marie E. Martell concur in this decision.

Board members Diether H. Haenicke and Nancy Wonch were absent and did not participate.