

STATE OF MICHIGAN
Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellant,

v

Michael J. Balian, P 39972,

Respondent/Appellee,

Case No. 99-174-GA

Decided: May 22, 2001

BOARD OPINION

The Grievance Administrator petitioned for review of the hearing panel's order of dismissal dated June 29, 2000. The formal complaint in this matter charged respondent with violating MRPC 4.2 and 7.3. The Administrator voluntarily dismissed the portion of the complaint alleging violation of MRPC 4.2. On review, the Administrator argues that the panel's report and amended report do not contain "sufficient facts to permit petitioner to meaningfully exercise his right of appeal." A remand with directions to the panel to draft a second amended report is requested. Specifically, the Administrator requests that the hearing panel be directed to identify those facts on the record from which the panel concluded that an agency relationship existed between the potential client whom respondent contacted by telephone and the attorney who requested that respondent make that call.

We deny the relief requested and, to the extent the Administrator seeks or would seek reversal based on the ground that "the record does not support the hearing panel's findings and dismissal" (petitioner's brief, p 1), we affirm the hearing panel's dismissal of the formal complaint.¹

¹ The prayer for relief requests a remand to the panel rather than reversal. However, the brief asserts that the panel's findings lack support in the record.

The formal complaint alleges that respondent violated MRPC 7.3 by initiating telephone contact with Cleveland Walcutt for the purpose of soliciting professional employment. Few factual matters are in dispute according to the record. On or about November 7, 1998, Mr. Walcutt, who was in his nineties, was hospitalized after a fall. On Monday, November 9, 1998, attorney William Fisher, who was acquainted with Mr. Walcutt through his daughter-in-law, telephoned respondent and informed him that Mr. Walcutt had contacted him and had “a lot of concerns about what may be going on with his assets.” (Tr, p 118.) According to respondent’s un rebutted testimony, Fisher told him that Walcutt “want[ed] to have an attorney and [Fisher] told [Walcutt] that [Fisher] would find an attorney for him. Please call him up and see if you can help him out.” (Tr, p 118-119.)

As requested by attorney Fisher, respondent telephone Mr. Walcutt in the hospital that day. (Tr, pp 117-118.) Mr. Walcutt told respondent that he wanted to prevent the transfer and removal of his assets so that he could remain independent and have sufficient funds to endow a chair for his deceased wife at the University of Michigan. (Tr, pp 123-124.) Respondent then called the probate court to make sure no guardianship or conservatorship proceedings had been commenced (Tr, p 124), and prepared a durable power of attorney at Walcutt’s request. (Tr, pp 104-106; Exhibit C.) Respondent telephoned Mr. Walcutt again the next day, November 10, 1998, to make arrangements to meet with him and then went to his hospital room with his secretary and Mr. Fisher who witnessed Mr. Walcutt’s signature. (Tr, pp 105, 141-142.) Respondent spent about an hour and a half with Walcutt ascertaining his competence and wishes. (Tr, pp 141-143.)

The Administrator does not claim that respondent acted in bad faith. (Tr, p 150.) The formal complaint does not allege that respondent engaged in fraud or exerted undue influence in his telephone or in-person contacts with Walcutt. The alleged misconduct in this case is apparently confined to respondent’s telephone call to Mr. Walcutt on November 9, 1998 following respondent’s conversation with attorney Fisher.

The hearing panel made the following findings of fact and conclusions of law:

The respondent received a telephone call from Mr. Fisher, and Mr. Fisher represented to the respondent that Mr. Cleveland Walcutt wanted to speak to an attorney. The respondent then telephoned Mr.

Walcutt concerning legal representation, and thereafter went to see Mr. Walcutt in the hospital the following day. The respondent did not know at that time that Mr. Walcutt was in fact represented by Mr. B_____. In contacting Mr. Walcutt, the respondent was acting upon a good faith reliance on the information he had received from Mr. Fisher, a fellow attorney, that the contact had been requested by the prospective client, i.e., Mr. Walcutt.

Sometime prior to the conduct complaint of in these proceedings by the petitioner, Mr. B_____ had received a phone call from a stockbroker named Elliott Nadel, and Mr. Nadel represented to Mr. B_____ that Mr. Walcutt needed the service of an attorney. Mr. B_____ then contacted Mr. Walcutt, and he was retained as his attorney.

* * *

The petitioner voluntarily dismissed any charges under MRPC 4.2 (See p 151 of transcript). Rule 4.2 prohibits contact with a party known to be represented by another attorney without the other attorney's permission.

At all times relevant to these proceedings, Mr. William L. Fisher was acting as the agent of Cleveland Walcutt in his communications with the respondent.

The conduct of the respondent complained of by the petitioner does not constitute professional misconduct under any of the Michigan Rules of Professional Conduct cited in the formal complaint. Indeed, the complainant himself engaged in precisely the same conduct as the respondent, except that the agent of Mr. Walcutt in the complainant's case was not a fellow attorney. [Hearing Panel Report, p 4.]

Before addressing the Administrator's arguments, we must observe that although the panel mentioned the manner of Mr. B_____ 's retention, it did not disregard MCR 9.105, which states in part: "The fact that certain conduct has remained unchallenged when done by others or when done at other times or has not earlier been made the subject of disciplinary proceedings is not an excuse." In other words, we do not read the panel's report as justifying solicitation because it has happened elsewhere. Rather it appears that the panel reasoned that respondent was entitled to rely on Fisher's apparent authority to

contact him on behalf of Walcutt, at least as much as Mr. B_____ was entitled to rely on Nadel's apparent status as an agent of Mr. Walcutt. We do not find that the Nadel-B_____ contacts with Mr. Walcutt contribute much as a legal or evidentiary matter to the resolution of the dispositive issues in this case, but we are convinced that any reliance the panel may have placed on them does not undermine the panel's decision.

The Administrator argues there should be a remand to the panel with instructions to the panel "to draft a second amended report identifying the facts from which they concluded that an agency relationship existed between respondent and Mr. Walcutt and explaining how such a relationship justified respondent's in-person contact with Mr. Walcutt." We decline to order such a remand. In assessing the sufficiency of factual findings in discipline proceedings we turn to the rule governing this question in a bench trial, MCR 2.517 and cases applying this rule.² Appellate courts rather consistently hold that "as long as it appeared from the court's findings of fact that the trial court was aware of the factual issues and correctly applied the law, the court rule was satisfied." People v Wardlaw, 190 Mich App 318, 321 (1991). See also Triple E. Produce Corp, 109 Mich App 165, 177 (1995).

The panel's essential finding in this case was that respondent's conduct did not violate MRPC 7.3 because "respondent was acting upon a good faith reliance on the information he had received from Mr.

² MCR 2.517 provides, in part:

(A) Requirements:

- (1) In actions tried on the facts without a jury or with an advisory jury, the court shall find the facts specially, state separately its conclusions of law, and direct entry of the appropriate judgment.
- (2) Brief, definite, and pertinent findings and conclusions on the contested matters are sufficient, without overelaboration of detail or particularization of facts.
- (3) The court may state the findings and conclusions on the record or include them in a written opinion.
- (4) Findings of fact and conclusions of law are unnecessary in decisions on motions unless findings are required by a particular rule. See, e.g., MCR 2.504(B).

Fisher, a fellow attorney, that the conduct had been requested by the prospective client, i.e., Mr. Walcutt.” (Hearing Panel Report, p 4.) We conclude that there was proper evidentiary support in the record for that finding and we agree with the hearing panel’s ultimate decision. The panel’s additional finding that attorney Fisher was acting as the agent of Mr. Walcutt in his communications with the respondent was not a necessary predicate for the panel’s decision to dismiss the charge of solicitation. It is difficult to see how a remand to the hearing panel on the question of an actual agency relationship between Mr. Fisher and Mr. Walcutt would serve a useful purpose in light of our affirmance of the hearing panel’s decision on the grounds stated above.

Furthermore, the panel’s legal conclusion that Mr. Fisher “was acting as the agent of Cleveland Walcutt in his communications with the respondent” almost certainly embraces a finding that Mr. Walcutt did in fact request Mr. Fisher’s assistance in finding an attorney. We can read the panel’s report in no other way, and after a review of the whole record we are not disposed to remand to the panel to require them to make a more explicit finding. Nor would we be inclined to permit additional evidentiary proceedings at this point. Mr. Walcutt was called as a witness by the Grievance Administrator and was subject to cross-examination. As noted in the Administrator’s brief, Mr. Fisher was subpoenaed by the Administrator and was available to testify although neither party called him as a witness. Both parties were apparently satisfied that his testimony regarding his communications with either Mr. Walcutt or the respondent was unnecessary.

The record shows that not only did respondent have a good faith belief that Mr. Walcutt requested respondent to contact him initially, but that Mr. Walcutt did in fact have concerns about his estate and retained respondent to address some of those concerns. Mr. Walcutt testified that he wanted to be “divorced” from Mr. B_____. Dr. Maddens testified that he was wary when he saw respondent and Mr. Fisher in Walcutt’s room because he had been called by a friend of Mr. Walcutt who raised concerns that a stockbroker from New York might be visiting Mr. Walcutt and “may have been taking advantage of him financially.” (Tr, p 79. See also, Tr, p 67.) And, although the assertions at page 2 of the Administrator’s brief would lead one to believe that Mr. Walcutt testified unequivocally that he never spoke with Mr. Fisher about dissatisfaction with Mr. B_____, the transcript is actually much less clear.

See Tr, p 134. Whether or not Mr. Walcutt actually requested Mr. Fisher to find him an attorney, there is ample evidentiary support in the record for the panel's finding that respondent had a good faith belief that he was responding to such a request. There is also sufficient evidence to support a good faith belief by respondent that he was appropriately assisting Mr. Walcutt preserve his assets and reverse the effect of recent estate planning documents inconsistent with his wishes.

In summary, there is insufficient evidence in the record to establish the misconduct charged here, namely, solicitation in violation of MRPC 7.3. Moreover, there is more than sufficient evidence to support the panel's finding that "respondent was acting upon a good faith reliance on the information he received from Mr. Fisher, a fellow attorney, that the contact had been requested by the prospective client, i.e., Mr. Walcutt." We are convinced that the panel understood the legal and factual issues in this case and reached the appropriate result.

Board members Wallace D. Riley, Theodore J. St. Antoine, Michael R. Kramer, Grant J. Gruel, and Marsha M. Madigan, M.D., concur in this decision.

Board Member Marie E. Martell dissents and would reverse the order of dismissal and remand for hearing on discipline.

Board Members Nancy Wonch, Diether H. Haenicke and Ronald L. Steffens were absent and did not participate.