Grievance Administrator,

Petitioner/Appellee,

v

PAMELA C. HARTWIG, P 10706

Respondent/Appellant.

97-266-GA

Decided: June 7, 1999

BOARD OPINION

Respondent petitioned for review of the hearing panel's findings on Count 2 of the formal complaint that respondent was "technically guilty of misconduct" for failing to respond to a request for investigation and that she should be reprimanded. Respondent argues that under the facts and circumstances of this case, she had good cause not to respond to the request for investigation because she never actually received it. Respondent further argues that MCR 9.104(7), the rule which declares that failure to answer a request for investigation is misconduct,
is void and unconstitutional.

In accordance with our opinion in Grievance Administrator v Rhonda R. Russell, 91-202-GA; 91-235-FA (1992) we reject respondent's argument that the rules pertaining to the service of a request for investigation and the duty to answer a request for investigation are constitutionally deficient. However, we also reaffirm our holding in Russell that non-delivery of a request for investigation, through no fault of the respondent, may be material and relevant to the issue of whether or not the failure to answer that request for investigation constitutes professional misconduct. Finally, we conclude that the evidence in this case failed to establish that the request for investigation was mailed to respondent's address registered with the State Bar of Michigan as required by MCR 9.112(C)(1)(b). Accordingly, the hearing panel's finding of "technical misconduct" as to Count 2 is reversed and the order of reprimand is vacated.

(A) DID THE GRIEVANCE ADMINISTRATOR ESTABLISH, PRIMA FACIE, THAT RESPONDENT FAILED TO ANSWER A REQUEST FOR INVESTIGATION WHICH WAS PROPERLY SERVED IN ACCORDANCE WITH THE COURT RULES?

An attorney's duty to answer a request for investigation (RI) is stated in MCR 9.113(A):

> (A) **Answer**. Within 21 days after being served with a request for investigation under MCR 9.112(C)(1)(b), the respondent shall file with the administrator a signed written answer in duplicate fully and fairly disclosing all the facts and circumstances pertaining to the alleged misconduct. [emphasis added]

MCR 9.112(C)(1)(b), in turn, requires the Grievance Administrator to:

> (b) Serve a copy of the request for investigation on the respondent by ordinary mail at the respondent's address on file with the State Bar as required by Rule 2 of the Supreme Court Rules concerning the State Bar of Michigan. Service is effective at the time of mailing and non-delivery does not affect the validity of service. If a respondent has not filed an answer, no formal complaint shall be served with the board unless the grievance administrator has served the request for investigation by registered or certified mail return receipt requested.

In order to prove the misconduct alleged in Count 2 of the complaint the Administrator had to establish two elements: (1) that the RI was properly served in accordance with the applicable court rule; and, (2) that Ms. Hartwig failed to answer within the time provided.

In this case, respondent has always admitted that she did not answer the RI, albeit on the grounds that she never received it, leaving the Administrator only with the task of proving proper service in accordance with MCR 9.112(C)(1)(b) in order to make out a prima facie case. In most cases, this is generally accomplished by introducing the receipt for mailing showing that the RI was mailed by certified mail as well as a certificate prepared by the State Bar of Michigan showing respondent's registered address at the time the RI was mailed.

The public hearing before the panel was conducted in this case on April 13, 1998 in Kalamazoo. In support of Count 2, the Grievance Administrator's counsel relied upon three exhibits.

Petitioner's Exhibit 4 is a certificate from the State Bar of Michigan, dated April 7, 1998, which certified that the then current address of Pamela C. Hartwig, as of April 7, 1998 was P. O. Box 634, St. Joseph, Michigan 49085-0270 and that the address had been on the State Bar's records since December 2, 1997.

Exhibit 5 is a cover letter, request for investigation and envelope showing that the RI was sent by the Attorney Grievance Commission, by regular mail, on December 18, 1996 to respondent at "728 Pleasant Street, #2, P. O. Box 270, St. Joseph, Michigan 49085." The original envelope offered as part of the exhibit is marked "Return to Sender. Box Closed. Unable to Forward, Return to Sender."

Exhibit 6 is a letter, copy of request for investigation and original envelope showing that a copy of the RI was mailed by the Attorney Grievance Commission by certified mail on January 15, 1997 to respondent at 728 Pleasant Street, #2, P. O. Box 270, St. Joseph, Michigan 49085. The postal service "Return to Sender" stamp on the envelope indicates that the letter was "unclaimed."

In short, these three exhibits establish only that the RI was mailed to respondent at P. O. Box 270 by regular and certified mail in December 1996 and January 1997 but that after December 2, 1997 (approximately one year later), respondent's address registered with the State Bar of Michigan was P. O. Box 634. At the review hearing before the Board, the Administrator's counsel candidly acknowledged that his office had offered no documentary evidence to establish respondent's registered address prior to December 1997 and, specifically, had not offered a certificate from the State Bar showing respondent's registered address at the time the RI was mailed.

Attempting to persuade us that the record contains other evidence which establishes respondent's registered address at the time of the mailings, the Administrator states: "Respondent acknowledged that her prior address was P. O. Box 270 (Tr. 28; Panel Report, p. 3)." (Administrator's Supp. Brief, p 2.)

We are unable to find respondent's unambiguous acknowledgment of that address on the cited transcript page. Respondent was asked by the panel chairperson "What was your correct address on December 18, 1996?" She answered:

> It would have been either P. O. Box 270 or P. O. Box 634 and I had forwarding cards going between. Did you want my street address, Mr. Giles? [sic] (Tr. 28, lines 23-25, emphasis added)

The questioning by the panel chairperson continued on page 29:

> Q. I would like to know what address you were at for State Bar purposes?
>
> A. Well, for the State Bar purposes, I have always used the P. O.. Box, since I put up domestic work and had a child at home. I was residing at 283 Marina, which was large enough to move my office into it. So once I had worked out things with the landlord, that is where I have been located since September - -.
>
> Q. Of what, 1997?
>
> A. Yeah.
>
> Q. What did you consider to be your professional mailing address in January 1997?
>
> A. It would be P. O. Box 634 and it was supposed to be forwarded, even if it went to P. O. Box 270.
>
> Q. When did you make that forwarding order?

A. I truly don't know. It was during the month of December.

Q. 1996?

A. Yes. or early January 1997. I tried to use the old box, the 270, for a while, but the mail was getting too messed up.

Chairman Smith Thank you. . . (Tr. p 29)

Respondent's claim that she never received the request for investigation mailed to her by the Grievance Commission in December 1996 and January 1997 is convincingly buttressed by the simple fact that the original envelopes were in the Grievance Administrator's possession, having been returned, undelivered, by the U. S. Postal Service. While it is true that MCR 9.112(C)(1)(b) states that non-delivery does not affect the validity of service, that rule first requires that the request for investigation be mailed to the respondent at his or her address on file with the State Bar as required by Rule 2 of the Supreme Court Rules concerning the State Bar of Michigan. Although the Administrator established that he served the request for investigation to Ms. Hartwig at P. O. Box 270 in St. Joseph, Michigan, the record does not establish that P. O. Box 270 was Ms. Hartwig's address registered with the State Bar when the RI was mailed. The Grievance Administrator did not sustain the burden of establishing that the request for investigation was properly served in accordance with MCR 9.112(C)(1)(b).

(B) APPLICABILITY OF THE BOARD'S OPINION IN GRIEVANCE ADMINISTRATOR V RHONDA RUSSELL

In the brief in response to respondent's petition for review, the Administrator argued that the respondent's actual receipt of the request for investigation is not a requisite element of the service requirements of MCR 9.112(C)(1)(b). We do not disagree with that argument. However, since we ruled in 1992 in a case factually similar to this one that even if the request for investigation was properly served, a respondent could nevertheless defend the charge by establishing that he or she had no actual notice of the request for investigation where the non-delivery was not the result of any culpability on respondent's part, and since reference to that opinion was conspicuously absent in the briefs filed by either party, we requested that both parties file supplemental briefs specifically addressing the applicability, if any, of our opinion in Rhonda Russell, supra, to the issues presented in this case.

For the reasons discussed in the preceding section, we have now concluded that the evidence in the record is insufficient to establish proper service to respondent's Rule 2 address. Therefore, the issue of delivery or non-delivery discussed in Russell is not necessary to our disposition of this petition for review. However, we take this opportunity to dispel some apparent misperceptions regarding our ruling in Russell. The Grievance Administrator's supplemental brief asserts:

> In Russell, the hearing panel made a finding of misconduct that the respondent had failed to answer the request for investigation but declined to impose any discipline. This Board affirmed the decision of the hearing panel.
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> * * *
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> The record before the hearing panel in Russell established that the non-delivery could not be attributed to the respondent. In its decision, this Board cited as other examples of innocent non-delivery warranting no discipline "the respondent's mailbox [being] destroyed by vandals, the post office [burning] to the ground or the carrier [throwing] his deliveries in the land fill. (Russell p 2). These examples serve to illustrate how "clean" a respondent's hands must be raise a non-delivery defense. [Grievance Administrator's Supp. Brief 10/1/98, pp 3 & 4.]

First, the hearing panel in Rhonda Russell did not find misconduct for failure to answer the request for investigation. On the contrary, the hearing panel in that case accepted respondent's testimony that she was experiencing difficulty with her mail and did not actually receive the request for investigation. The panel dismissed the complaint in its entirety for the reason that misconduct was not established. We affirmed that dismissal. While the Administrator argues that Russell is distinguishable and "therefore cannot mitigate respondent's discipline below the level of a reprimand," our opinion in Russell was not about mitigation or the level of discipline. Rather, that opinion stands for the proposition that non-culpable non-receipt of a request for investigation can be asserted as a defense to a charge of failure to answer that request for investigation.

We addressed this issue in Russell because of the Grievance Administrator's unyielding insistence to the panel and the Board in that case that an attorney who could prove unquestionably that he or she had not received a request for investigation through no fault of their own must nevertheless be disciplined for failure to answer the document and that non-delivery was irrelevant to the issue of misconduct.

In Russell, the Administrator's counsel advised the hearing panel that once he established that the request for investigation had been served, "the fact that she doesn't get it is not material or relevant, because the rule says service is effective at the time of mailing and non-delivery doesn't affect the validity." Russell, supra, p 2.

Responding to that argument, we wrote in Russell:

> Adoption of the [Administrator's] argument presented in this case would result in the imposition of professional discipline in every case involving a failure to file a timely answer to a request for investigation even if the respondent could establish conclusively that there was non-delivery. To cite extreme examples, discipline would be imposed even if it were established that the respondent's mailbox had been destroyed by vandals, that the post office had burned to the

> ground or that the mail carrier had thrown his deliveries in a land fill. (Russell p 2, emphasis added.)

We did not cite those extreme examples as illustrations of how "clean" a respondent's hands must be to raise a non-delivery defense. We cited them as potentially absurd results if the Administrator's argument was adopted without any allowance for logic or fairness.

Perhaps the Grievance Administrator fears that our opinion in Rhonda Russell will open the flood gates to a surge of meritless claims by respondents that they never received a request for investigation. It has now been six years since our opinion in Russell and that torrent has yet to be released. Furthermore, there is nothing in our opinion in Russell which suggests that an attorney may escape liability for failing to answer a request for investigation by simply claiming that it was not delivered. The burden of establishing non-delivery of a request for investigation rests squarely upon the respondent who asserts such a defense. Non-delivery must be established to the panel's satisfaction by credible testimony or other evidence and the respondent must establish that he or she is not culpable. For example, non-delivery would not be a defense if the attorney "forgot" to notify the State Bar of Michigan of a change in registered address. The goals of these proceedings are not impeded by the Board's opinion in Rhonda Russell and its holding that a claim of non-culpable, non-delivery of a request for investigation, if established by competent evidence, may be both material and relevant to a claim of professional misconduct based upon an attorney's failure to answer.

Board Members C. H. Dudley, Barbara B. Gattorn, Grant J. Gruel, Albert L. Holtz, Michael R. Kramer, Kenneth L. Lewis, Roger E. Winkelman and Nancy A. Wonch.

Board Members Elizabeth N. Baker did not participate in this decision.