Grievance Administrator,

Petitioner/Appellee,

v

Hayim Gross, P 14419,

Respondent/Appellant.

97-138-GA; 97-165-FA

Decided: April 12, 1999

BOARD OPINION

Respondent petitioned for review of a hearing panel order of reprimand based upon the panel's conclusion that respondent failed to communicate adequately with his client in a criminal matter in violation of Michigan Rule of Professional Conduct 1.4(a). Respondent argues that the panel's finding of misconduct is both erroneous in fact and contrary to law. Further, respondent argues that if he committed misconduct, it was to such a minimal degree that no discipline should be imposed. The Attorney Discipline Board has conducted review proceedings in accordance with MCR 9.118 and has reviewed the record below. We conclude that the hearing panel's well-reasoned findings and conclusions have evidentiary support and its decision to impose a reprimand is appropriate under the circumstances. The hearing panel's decision is affirmed.

The formal complaint alleges that respondent was retained in November 1994 by Janet Trogan to represent her husband, Nicholas Trogan, Jr., to pursue post-conviction proceedings in a criminal matter. Respondent was paid a $1000 retainer fee for the representation. Count 1 of the complaint alleges, among other things, that respondent failed to respond to Mr. and Mrs. Trogan's numerous inquiries as to the status of the matter, in violation of MRPC 1.4(a). Evidentiary hearings were conducted by the panel on October 29, 1997, January 26, 1998 and April 2, 1998. The hearing panel's report on misconduct appropriately reflects the panel's consideration of the various charges in the complaint, the panelists' understanding of the appropriate burden of proof and their consideration of the issues of credibility. Because of the relative lack of documentary evidence, the case before the panel turned, to a large extent, on the conflicting testimony of Mr. and Mrs. Trogan on the one hand and respondent on the other.

The standard of review to be followed by the Board in this case is whether or not there is proper evidentiary support in the whole record for the findings of the hearing panel. State Bar Grievance Administrator v DelRio, 407 Mich 336, 349; 285 NW2d 277 (1979); In re Freedman, 406 Mich 256; 277 NW2d 635 (1979). The Board has recognized that a hearing panel is uniquely

qualified to observe the witnesses and to evaluate their credibility. Panel findings based upon credibility should be given deference by the Board.

We share respondent's concern with the provenance of the purported engagement letter [Respondent's Exhibit #1] identified by Mr. Trogan as a letter sent to him by respondent. Respondent vigorously denied that he wrote this unsigned, undated letter typed on plain paper. The hearing panel's report did not specifically address the issues of whether or not respondent wrote and sent the letter, whether the letter was prepared by someone else, or whether the letter was prepared with the knowledge or participation of Mr. Trogan. However, the fact that these questions may remain unanswered does not invalidate the panel's findings on the issue of respondent's lack of communication with his client. There is sufficient evidentiary support in the record, including the testimony of both Mr. and Mrs. Trogan, to support that finding.

We have also considered the question of whether or not Mr. Trogan sent certain written requests for information from his attorney to the wrong address. Even if we accept respondent's claim that he did not receive those letters from his client, respondent was not absolved of his critical responsibility under MRPC 1.4 to keep his client "reasonably informed" about the status of a matter or his ongoing duty under MRPC 1.4(b) to explain the matter to his client "to the extent reasonably necessary to permit the client to make informed decisions about the representation." The duty to communicate imposed by MRPC 1.4 is imposed on the attorney, not on the client.

Having found that the panel's findings of fact are supported by the record and that its conclusions of law are not erroneous, we consider respondent's argument that even if he committed the misconduct found by the panel, a reprimand is not appropriate and he should be given a lesser discipline, or no discipline at all. Since there was no request for the entry of an order of probation pursuant to MCR 9.121(C), we can avoid entanglement in the abstract question of whether an order of probation under MCR 9.106(4) is a "lesser" discipline than a reprimand under MCR 9.106(3). In this case, the least form of discipline available to a hearing panel, the Board or the Supreme Court is an order of reprimand. See MCR 9.106.

It is true that a "no discipline" option exists upon a finding of misconduct, as explicated by our Supreme Court in Grievance Administrator v Deutch, 455 Mich 149 (1997). There, the Court clarified that "The order of discipline [required by MCR 9.115(J)(3)] may, in fact, order no discipline at all." Deutch, 455 Mich at 163. However, the Board has expressed its view that while the "no discipline" option exists on a finding of misconduct in a matter instituted by the of a formal complaint pursuant to MCR 9.115(A), this option should be exercised sparingly. The types of misconduct warranting a reprimand have been described as "relatively innocuous, technical or isolated violations that suggest an unusual or minor lapse of judgment rather than a more derelict state of mind." Wolfram, Modern Legal Ethics (1986), Sec. 3.5.3, p 127. As the Board has noted:

> Even a competent and ethical attorney may suffer an uncharacteristic lapse and find himself or herself in violation of the rules of professional conduct. When such an attorney is reprimanded, it does not necessarily brand him or her as "unethical," nor does it necessarily connote an intentional violation of the rules in that instance. But a reprimand does serve the important function of marking the boundaries of ethical conduct for that attorney as well as others. [Grievance Administrator v William R. McFadden, 95-200-GA (ADB 1997),] lv den ____ Mich ____ (1998)

We are not persuaded that the facts of this case warrant the "no discipline" option. The panel's decision to order a reprimand was not inappropriate and it is affirmed.

Board Members Elizabeth N. Baker, C. H. Dudley, Barbara B. Gattorn, Roger E. Winkelman and Nancy A. Wonch.

Board Members Grant J. Gruel, Albert L. Holtz, Michael Kramer and Kenneth L. Lewis did not participate.