

Grievance Administrator,
Petitioner/Appellee,

v

Philip A. Gillis, P 14002
Respondent/Appellant.

96-248-GA

Decided: October 16, 1997

BOARD OPINION

The hearing panel found that respondent failed to answer a request for investigation as required by MCR 9.113(A). Respondent seeks review of the hearing panel's order of reprimand. We vacate the panel's order and dismiss the formal complaint.

Respondent was charged, in Count I of the formal complaint, with: failure to refrain from representing a client after being discharged; failure to keep the client reasonably informed; settling a matter without the knowledge and consent of the client; and failure to explain a matter to the extent reasonably necessary to permit the client to make informed decisions. After a hearing at which the client testified, the panel concluded that the allegations were not proven, and Count I was dismissed. The dismissal of Count I is not challenged on review.

Count II alleged that a request for investigation filed in the name of the Grievance Administrator was served on respondent on March 6, 1996 and that respondent failed to answer the Request for Investigation within twenty-one days of service as required by MCR 9.113(A). In his answer to the formal complaint, respondent asserted:

I refused (not failed) to answer an unsigned request for investigation. I promptly responded to the complaint both by phone and by mail. See the attachments. [Answer, Paragraph 13.]

One of those attachments is respondent's letter dated March 12, 1996, to the Grievance Administrator, in response to the request for investigation. In this letter, (introduced into evidence at the hearing by the Grievance Administrator as Petitioner's Exhibit #8), respondent enumerated several objections to the request for investigation and his reasons for refusing to provide an answer.

The duty to answer a request for investigation is set forth in MCR 9.113(A). That rule directs that the respondent/attorney must file an answer within twenty-one days after being served. MCR 9.113(B) provides that a failure to answer within the time allowed is misconduct, but it also provides that an express refusal to answer has different consequences:

(B) Refusal or Failure to Answer.

(1) A respondent may refuse to answer a request for investigation on expressed constitutional or professional grounds.

(2) The failure of a respondent to answer within the time permitted is misconduct. See MCR 9.104(7).

(3) If a respondent refuses to answer under subrule (B)(1), the refusal may be submitted to a hearing panel for adjudication.

Respondent's letter of March 12, 1996 (Petitioner's Exhibit #8) clearly constituted a refusal to answer a Request for Investigation "on expressed constitutional [and] professional grounds" within the meaning of MCR 9.113(B)(1). Respondent based his refusal on the purported unconstitutionality of the discipline system and the refusal of his client to waive the attorney/client privilege, among other things.

The Administrator argues that MCR 9.113(B)(3) does not require him to submit a respondent's refusal to answer a request for investigation to a hearing panel. This is true.¹ However, if the

¹ The prior rule, MCR 9.114(A)(2), made the submission of the refusal to answer to a hearing panel mandatory:

If a respondent refuses to answer under MCR 9.113(B)(1),

respondent's constitutional or professional objections are not resolved by a panel order requiring respondent to answer the request for investigation, the respondent is not guilty of a "failure to answer" within the meaning of MCR 9.104(7).

Refusal to answer a request for investigation based on expressly stated grounds is plainly allowed by MCR 9.113(B)(1). That rule is consistent with MRPC 3.4(c), which provides that a lawyer shall not:

knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists. [Emphasis added.]

Also, MRPC 8.1(b) provides that a lawyer shall not "knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information protected by Rule 1.6."

These rules have, in one form or another, been in effect for years without causing a flood of frivolous objections to requests for investigation. MCR 9.113(B)(3) provides an expedient and logical procedure by which objections to requests for investigation may be raised and adjudicated. Our rules penalize disregard of an investigation, not the assertion of an argument regarding its propriety.

The Administrator could have submitted the respondent's refusal to a hearing panel for adjudication as provided in MCR 9.113(B)(3). If the panel had ruled that respondent's refusal was

the refusal must be submitted to a hearing panel for adjudication. [Former MCR 9.114(A)(2); emphasis added.]

(footnote continued on next page)

(footnote 1 continued)

Effective June 1, 1987, that provision was renumbered and modified by replacing "must" with "may." The staff comment to that amendment says:

The submission to a hearing panel is permissive rather than mandatory, since, in most cases, the administrator will not contest the propriety of respondent's exercise of a privilege, and submission to a hearing panel in such circumstances would be unnecessary. (Emphasis added.)

an appropriate exercise of constitutional rights and/or privileges, the Administrator would have been foreclosed from bringing formal charges alleging that respondent had failed to answer. If, on the other hand, the panel determined that respondent's refusal to answer was improper, and respondent did not thereafter answer, then the respondent could have been subject to disciplinary sanction for failure to answer the request for investigation.

CONCLUSION

Respondent did not ignore a request for investigation. Rather, he submitted a timely challenge to the request for investigation based on what appear to be sincere, if ultimately erroneous, readings of the court rules and interpretations of the constitution. That response was allowed by the rules. The hearing panel's order of discipline reprimanding respondent is vacated and the formal complaint is dismissed.

Board Members Albert L. Holtz, Miles A. Hurwitz, Michael R. Kramer, Kenneth L. Lewis and Nancy A. Wonch concur in this decision.

Board Members Elizabeth N. Baker, C. H. Dudley, Barbara B. Gattorn and Roger E. Winkelman did not participate in this decision.