

Grievance Administrator,

Petitioner/Appellant,

v

Bruce J. Sage, P 23830,

Respondent/Appellee.

Case No 96-35-GA

Decided: February 14, 1997

BOARD OPINION

The formal complaint alleges that respondent violated various rules in connection with his representation of a divorce client. Among the rules allegedly violated were: MRPC 1.1 (competence, preparation, neglect); MRPC 1.2(a) (lawyer shall seek client's lawful objectives); and, MRPC 1.3 (diligence). The hearing panel assigned to this case granted respondent's motion for summary disposition pursuant to MCR 2.116(C)(10). We reverse and remand for further proceedings.

I. Procedural History

While representing a divorce client respondent negotiated a judgment providing that the client would be entitled to a share of her husband's pension. Respondent did not, however, obtain a Qualified Domestic Relations Order (QDRO) before billing the client and closing the file.¹ Approximately four years later, the client

¹ A QDRO is generally necessary to effectuate the division of retirement benefits:

Each [retirement] plan that is subject to the antialienation provisions of the Employee Retirement Income Security Act of 1974 (ERISA), 29 USC 1056(d)[,] IRC 401(a)(13)[,] or both generally cannot pay an employee's benefit to anyone other than the employee. This is true even though the employee may have agreed to the payment to a third party, a court has ordered the payment, or both. . . . However, the Retirement Equity Act of 1984 (REA), Pub L No 98-397, 98 Stat 1426, created a limited

telephoned respondent and informed him that she was then entitled to receive her share of the ex-husband's pension benefits, but that the employer would not make payments to her. According to respondent's affidavit in support of his motion for summary disposition, he told her he would locate her file and call her back. Before he did so, she filed a request for investigation with the Attorney Grievance Commission.

The formal complaint alleges that respondent was obligated, among other things,

- a) To represent his client competently, diligently and expeditiously;
- b) To further his client's lawful objectives through reasonable means permitted by law;
- c) To avoid prejudicing or damaging his client's interests; and,
- d) To keep his client reasonably informed concerning the status of the matter. [Formal Complaint, ¶5.]

The complaint further alleges that:

Respondent violated his duties and responsibilities through his neglect of the matter and disregard for his professional obligations, as follows:

* * *

- b) He failed to ensure that [his client's] interests in her ex-husband's pension benefits were protected by the entry of a qualified domestic relations order [QDRO]. [Formal Complaint, ¶6.]

The complaint charges that respondent's conduct violated MRPC 1.1(a)-(c), 1.2(a), 1.3, 1.4, 3.2, and other rules.

Respondent filed a motion for summary disposition based on

exception to this general rule. It provided that a qualified domestic relations order (QDRO) could assign an employee's tax-qualified plan benefit to his or her former spouse or children without disqualifying the plan, subject to certain restrictions 29 USC 1056(d)(3); IRC 401(a)(13)(B), 414(p). . . . However, payment can be made only as directed by a court order that the plan administrator determines to be qualified under federal law. [Keppleman & Soper, QDROs, EDROs & Retirement Benefits: A Guide for Michigan Practitioners (ICLE, 1994), §3.1, p 3-2.]

MRPC 2.116(C)(8) and (C)(10). The hearing panel granted the motion, stating in part:

The Panel thus concludes that, based upon Respondent's Answer, Motion for Summary Disposition, supporting documentary evidence and Affidavit, there exists no genuine issue as to any material fact. At most, the issue to be resolved is one of law, i.e., whether Respondent committed misconduct by "neglect," in violation of MRPC 1.1(c), as explained in Grievance Administrator v Carrie L.P. Gray, [93-250-GA (ADB 1996), lv den 453 Mich 1216 (1996)], or was merely "negligent."

The Panel finds that, as a matter of law, Respondent did not commit misconduct by neglect. Respondent's Motion for Summary Disposition is therefore granted pursuant to MCR 2.116(C)(10), and the Formal Complaint is dismissed with prejudice.

II.

Summary disposition pursuant to MCR 2.116(C)(10) may be granted when "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." Summary disposition pursuant to this subrule may not be granted unless it is impossible for a record to be developed which would present a question upon which reasonable minds could differ. Skinner v Square D Co, 445 Mich 153, 162; 516 NW2d 475 (1994); Boumelhelm v Bic Corp, 211 Mich App 175, 178; 535 NW2d 574 (1995). The nonmoving party is given the benefit of reasonable doubt. Id. If the facts -- even though undisputed -- could support conflicting inferences, summary disposition should not be granted. DiFranco v Pickard, 427 Mich 32, 54; 398 NW2d 896 (1986). And, summary disposition under (C)(10) is not appropriate when the record is too incomplete to permit the court to conclude that the movant is entitled to judgment as a matter of law. See Cloverlanes Bowl, Inc v Gordon, 46 Mich App 518, 526; 208 NW2d 598 (1973).

A trial court's ruling on a motion for summary disposition is reviewed de novo. Boumelhelm v Bic Corp, 211 Mich App 175, 178; 535 NW2d 574 (1995); Barnell v Taubman, Co, Inc, 203 Mich App 110,

115; 512 NW2d 13 (1993).

A. Neglect.

In Gray, the respondent was an attorney in a corporate legal department who was alleged to have committed several acts of "neglect" in violation of MRPC 1.1 and 1.3. Under the circumstances there, which included respondent's close supervision by another attorney, we held:

Based upon our review of the authorities cited by the parties, we conclude that the respondent's simple negligence does not constitute unethical conduct warranting discipline. The hearing panel's order of reprimand is therefore vacated and the complaint is dismissed. [Gray, supra, p 2.]

One authority referenced in Gray was ABA Informal Ethics Opinion 1273 (November 20, 1973), which states:

Neglect involves indifference and a consistent failure to carry out the obligations that the lawyer has assumed before his client or a conscious disregard for the responsibility owed to the client. The concept of ordinary negligence is different. Neglect usually involves more than a single act or omission. Neglect cannot be found if the acts or omissions complained of were inadvertent or the result of an error of judgment made in good faith.

Although we found this ethics opinion consistent with the decisions of this Board, we do perceive certain elements which could be interpreted in a manner inconsistent with the Michigan Rules of Professional Conduct and the former Code of Professional Responsibility.

For example, to say that neglect "cannot be found if the acts or omissions complained of were inadvertent," may suggest that only willful conduct may be categorized as "neglect" or otherwise subject an attorney to discipline. The language of ABA Informal Opinion 1273 gave rise to the following argument, and rejoinder by the Kansas Supreme Court, in a case involving "neglect":

Respondent contends the petitioner State did not meet its burden of proof "to prove that Respondent

was conscious of what was going on as far as Sapp [another attorney in respondent's office who had been given responsibility for the file] was concerned and Sapp's failure to carry out the responsibility he had been given." Carried to the extreme, this argument would result in an attorney being able to defeat neglect charges by simply stating that he had forgotten about a case. The impossible burden would be on the petitioner to show the attorney had not forgotten the matter and was, at all times, conscious of what he or she should be doing. This would expand the concept of neglect into requiring a showing of intentional wrongdoing. [In Re Powers, 720 P2d 668; 67 ALR4th 409, 413 (1986) (construing DR 6-101(A)(3), the same version of which was in effect in Michigan until October 1988, now found in MRPC 1.1(c)).]

The concern that a blanket immunity for "inadvertence" might excuse too many acts or omissions appears to have been shared by the Maryland Supreme Court:

Given the duty of zealous representation that a lawyer owes the client, we are not persuaded that a failure to appear caused by poor office practices or simple forgetfulness can never be neglect. Nor are we convinced that inadvertent failure to comply with a mandatory [court] rule . . . can never be a violation of DR 6-101(A)(3). [Atty Grievance Comm'n v Ficker, 572 A2d 501 504 (Md 1990); emphasis added.]

We still agree with ABA Opinion 1273 that neglect generally involves more than a single instance of "ordinary" or "simple" negligence.² Neglect cases present facts from which indifference to a client's interest may be readily inferred. However, a panel should not dismiss merely because a respondent disclaims indifference or carelessness in a dispositive motion. Generally, these cases will require a full hearing.

B. Competence

² Such negligence may however constitute a violation of other rules such as MRPC 1.1 (requiring competent representation) or MRPC 1.3 (diligence). Kansas and Maryland, as Model Code jurisdictions, presumably have no precise counterparts to MRPC 1.1 or 1.3. The courts of those states may therefore read the definition of "neglect" more broadly to encompass norms and standards our Supreme Court has codified in other sections of the Rules of Professional Conduct.

In addition to the duty not to neglect a client's matter, our Rules of Professional Conduct impose a duty to render competent representation. MRPC 1.1, 1.1(a), and 1.1(b); Holt v State Bar Grievance Board, 388 Mich 50; 199 NW2d 195 (1972) (interpreting DR 6-101). Finding and applying key authorities is one aspect of competent representation. Holt, 388 Mich at 62-63 (competent appellate counsel would have recognized guilty plea deficiencies under Boykin v Alabama, 395 US 238 [1969] and state cases).³ The comment to MRPC 1.1 explains that:

Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners.

Applying the MCR 2.116(C)(10) standard after reviewing the evidence in support of respondent's motion, we cannot agree that there is no genuine issue of material fact and that respondent is entitled to judgment as a matter of law on the question whether he violated MRPC 1.1's duty to render competent representation. Respondent's answer to the Request for Investigation, for example, raises at least one question to be resolved at hearing. It reads in part:

I do specifically recall that Mrs. Hawk was concerned about a possible interest that she may have in her husband's pension at Ford Motor Company. [Page 1, ¶2.]

I believe that I protected Mrs. Hawk's interest in exemplary fashion. I further believe that she is entitled to a portion of Mr. Hawk's retirement benefits as indicated in the Judgment. I am willing to undertake any action against Ford Motor Company that might be appropriate, but I do not know if the same is allowed since the Complaint has been filed against me [Page 3, second full paragraph.]

These statements might be viewed by a trier of fact as indicating

³ See also, 1 Hazard & Hodes, The Law of Lawyering: A Handbook on the Rules of Professional Conduct (2d ed), §1.1:103, pp 8-9 (illustration: single instance of omitting a tax deduction created by recent code amendment is a violation of Rule 1.1 warranting minimal discipline).

that respondent did not understand -- even at the time he responded to the Request for Investigation -- that a QDRO was necessary to effect a distribution of the husband's pension rights.

Because the evidence proffered by respondent himself leaves open an issue about which reasonable minds could differ, summary disposition is not "appropriate" within the meaning of MCR 2.116(G)(4) as to the question whether respondent violated MRPC 1.1.

C. Diligence & Seeking the Client's Objectives

In adopting the Michigan Rules of Professional Conduct our Supreme Court did not wholly displace the former Code. For example, the Court combined in Rule 1.1 the provisions of DR 6-101 with the first sentence of Model Rule 1.1. The result is that MRPC 1.1 contains a clearly-stated affirmative duty to render competent representation in addition to the specific prohibitions contained in the former DR 6-101.

More to the point for this part of the analysis, the Court retained portions of the former Canon 7 urging zealous representation (see MRPC 1.2) while also adopting Model Rule 1.3 requiring that a lawyer act with reasonable promptness and diligence in representing a client. The formal complaint here alleges a violation of MRPC 1.3 which must also be examined.

Since MRPC 1.1(c) specifically prohibits neglect, it would be redundant to draft another rule, stated in affirmative terms, requiring that attorneys not neglect client matters. Accordingly, we conclude that "reasonable diligence and promptness" (MRPC 1.3) is not simply the obverse of the duty not to neglect a matter. It is a distinct obligation originating from the former Canon 7. And, despite the fact that it shares this heritage with MRPC 1.2(a) ("lawyer shall seek the lawful objectives of a client through reasonably available means permitted by law and these rules"), the duty imposed by MRPC 1.3 may not exactly mirror the duty in MRPC 1.2(a).

Summary disposition of the claims that respondent violated MRPC 1.2(a) and MRPC 1.3 is not appropriate. First, respondent's

motion for summary disposition was not specifically based on the argument that there was no genuine issue of material fact in support of these particular claims.⁴ Disposing of all claims is inappropriate when only some claims are challenged. See MCR 2.116(G)(4) (a motion under MCR 2.116(C)(10) must specify issues as to which no question exists for trial). Moreover, on the evidence before the panel, we cannot say that it would be impossible for the nonmovant to prevail at hearing.

MRPC 1.2(a) required respondent to seek the lawful objectives of his client through reasonably available means. Depending on the circumstances, obtaining a QDRO may not have been -- but probably was -- within the scope of representation afforded by respondent. Cf. State Bar of Michigan Informal Ethics Opinion RI 184 (January 19, 1994) (adversary proceeding within scope of representation of debtor seeking discharge in Chapter 7 bankruptcy case unless unambiguously and appropriately excluded). Assuming respondent was required to obtain a QDRO for his client, the question becomes whether the failure to do so was misconduct. MRPC 1.3 required respondent to act with reasonable diligence and promptness in representing his client. The term "reasonable" is defined in the comment to MRPC 1.0 as "denot[ing] the conduct of a reasonably prudent and competent lawyer."

Respondent's affidavit in support of his motion indicates that "the file was administratively closed and stored" after the client's bill was paid. This conclusory language does not remove the possibility that misconduct occurred. We do not preclude the panel from ultimately reaching this determination. However, the evidence submitted, including the affidavit, does not demonstrate that there is no genuine issue of fact and that respondent is entitled to judgment as a matter of law. Rather, the record assembled thus far shows that the panel should hear all of the relevant evidence, apply the provisions of the Rules of

⁴ Respondent arguably did address MRPC 1.3 in his motion by virtue of his reliance upon Gray, which cites that rule. However, we have here clarified that the duty of reasonable diligence and promptness imposed by MRPC 1.3 is distinct from the duty imposed by MRPC 1.1(c), even though the two may at times overlap. Accordingly, it is necessary for the panel to decide the case in light of this opinion.

Professional Conduct set forth in the complaint (including those interpreted herein), and then render a decision as to whether respondent's acts or omissions constituted misconduct.

D. Other Allegations.

The formal complaint contained allegations that respondent violated MRPC 1.4, MRPC 3.2, and other rules. These allegations should be addressed by the panel on remand.

III. Conclusion.

Not every negligent act or omission constitutes neglect, incompetence, the failure to act with reasonable diligence, or the violation of some other rule.⁵ However, some attorney negligence does fall into one or more of these categories of misconduct.

It is often said that discipline cases turn on their specific facts. In Re Grimes, 414 Mich 483, 490; 326 NW2d 380 (1981). This is particularly true with regard to a claimed violation of MRPC 1.1 or 1.3. In such cases a panel is called upon to evaluate a respondent's conduct in light of what a "reasonable" and "competent" practitioner would have done under all of the circumstances.

We reverse the order granting summary disposition and remand for proceedings consistent with this opinion.

Board Members Elizabeth N. Baker, C. H. Dudley, M.D., Barbara B. Gattorn, Miles A. Hurwitz, Michael R. Kramer, Nancy A. Wonch, and Roger E. Winkelman concur in this decision.

Board Member Albert L. Holtz dissents and would affirm the order granting summary disposition.

⁵ See, e.g., Grievance Administrator v Posner, ADB 126-88 (ADB 1990). See also Holt v State Bar Grievance Board, 388 Mich 50, 63; 199 NW2d 195 (1972) ("whether or not Attorney Whelan's course of action in this case constituted either incompetency or such negligence as to reach professional misconduct is a question which the State Bar Grievance [Board] must consider in a complete hearing of this case")

Board Member Kenneth L. Lewis was absent and did not participate.