Grievance Administrator,

Petitioner/Appellant,

v

David J. Anderson, P 27612

Respondent/Appellee.

Case No. 95-198-GA

Decided: December 30, 1996

BOARD OPINION

The Grievance Administrator has petitioned for review of the hearing panel's order of dismissal entered April 19, 1996. The Attorney Discipline Board has conducted review proceedings in accordance with MCR 9.118, including review of the record below. We affirm the hearing panel's dismissal of the charges of misconduct under MCR 9.104(1-3) and Michigan Rules of Professional Conduct 1.7, 1.16(a)(1) and 8.4(a), (b) and (c). However, we conclude that the respondent failed to meet his obligations under MRPC 1.4(a) and (b) to explain a legal matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. This matter is therefore remanded to the hearing panel to determine the appropriate level of discipline.

The hearing panel's factual findings are detailed at length in the panel's report. For the purpose of this opinion, the following summary will suffice. In 1986, a number of property owners in Barry County, including complainants William and Lori Haselden, retained the law firm of Anderson & Stull to file suit against Penn Central Railroad. Respondent and his law firm were retained: 1) to obtain all of the railroad's interest in an unused railroad right of way (an objective which all of the adjacent property owners had in common); and, 2) to then distribute the right-of-way to the adjacent property owners. The Haseldens retained respondent and his firm by paying the $250 retainer fee requested by the firm. In

November 1986, respondent's firm filed the law suit against Penn Central on behalf of the Haseldens and the other plaintiffs.

In approximately April 1987, the respondent was retained by Barry and Eaton County Circuit Judge Richard Shuster. Judge Shuster owned the property on the opposite side of the railroad right of way from the Haseldens. Unlike the Haseldens and other plaintiffs in the suit, Judge Shuster was not required to pay respondent a retainer fee. Rather, respondent testified that the judge would not be responsible for any fees or costs if the suit were unsuccessful. Fees or costs to be paid by the judge would be determined only if the suit were successful.

Some of the individuals who participated as interested parties in the litigation against Penn Central were named as plaintiffs and some were not. Judge Shuster and his wife were in the second category. Judge Shuster specifically denied any desire to keep his participation a secret. However, Judge Shuster and the respondent testified that they avoided making a "public" disclosure of Judge Shuster's involvement in the case.

During the course of the litigation, respondent's law firm used client representatives as liaisons to help disseminate information from the law firm to the clients who owned property adjacent to the right-of-way. The law firm also conducted meetings and corresponded with the clients to apprise them of the status of the case. Mr. Haselden testified that he was unaware of Judge Shuster's participation as an interested party in the law suit. Respondent offered testimony that Judge Shuster's participation was disclosed to the client representatives and was disclosed at one or more informational meetings which the Haseldens were invited to attend.

In June 1991, respondent's law firm and Penn Central were close to reaching a settlement of the litigation. The firm's client liaisons prepared lists of the parcels which the adjacent property owners wished to purchase. Mr. Haselden submitted a request to purchase 3.03 acres of the right-of-way adjacent to his property. While not specifically identified as such, Mr. Haselden's request for 3.03 acres of the right-of-way was, in fact, a request for the

entire portion of the right-of-way between his property and Judge Shuster's property. The panel accepted the testimony of respondent's partner that no one in respondent's firm understood at that time that Mr. Haselden's claim would preclude Judge Shuster from obtaining any portion of the right-of-way adjacent to his property and that the firm was therefore unaware of the conflict between Haselden's and Shuster's positions.

However, the conflict certainly became apparent in May 1994 when Mr. Haselden executed a "settlement acceptance" and tendered the sum of $904 for 3.03 acres of right-of-way adjacent to his property. The panel found that as soon as he became of aware of this conflict between his clients, respondent took prompt and reasonable steps to withdraw as counsel for both the Haseldens and the Shusters.

The Grievance Administrator's complaint charged that the respondent failed to explain matters to the Haseldens to the extent reasonably necessary to permit them to make informed decisions regarding the representation, in violation of MRPC 1.4; that respondent's simultaneous representation of the Haseldens and the Shusters was a conflict of interest in violation of MRPC 1.7 and MRPC 1.16(a)(1); and that respondent violated the rules of professional conduct, engaged in conduct involving dishonesty, fraud, deceit, misrepresentation or violation of the criminal law and engaged in conduct prejudicial to the administration of justice, all in violation of MRPC 8.4(a-c). The hearing panel found that the respondent's conduct was reasonable under the circumstances and concluded that the Grievance Administrator did not establish professional misconduct.

In matters involving disputed factual findings, the Board must determine whether the panel's findings have proper evidentiary support in the record. At the same time, the Board possesses a greater degree of discretion with regard to the ultimate result. Grievance Administrator v August, 438 Mich 296, 304; 475 NW2d 256 (1991); In re Daggs, 411 Mich 304, 318-319; 307 NW2d 66 (1981).

Review of the record in this case persuades us that there is proper evidentiary support for the hearing panel's factual findings

and they are affirmed. We also adopt the reasoning of the hearing panel in affirming its conclusion that the respondent's conduct did not violate the cited provisions of MRPC 1.7, 1.16(a)(1) and 8.4(a,b,&c).

We conclude, however, that respondent's conduct constituted a violation of MRPC 1.4:

> Rule 1.4 Communication
>
> a) a lawyer shall keep a client reasonably informed about the status of a matter and comply promptly with reasonable requests for information. A lawyer shall notify the client promptly of all settlement offers, mediation evaluations, and proposed plea bargains.
>
> b) a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Respondent argues strenuously that neither he nor members of his firm concealed Judge Shuster's participation in the law suit from the firm's other clients and, specifically, that the firm did not conceal Judge Shuster's participation from the Haseldens. Respondent also asserts that the Haseldens bear some responsibility for this lack of information. Respondent contends that the Haseldens attended few of the informational meetings conducted by the firm and that Judge Shuster's status as an interested party was disclosed at one or more of those meetings.

Respondent misperceives the nature of his responsibility under MRPC 1.4. It was the duty of respondent and his firm to take the steps reasonably necessary to provide relevant information to the Haseldens. It was not the clients' responsibility to determine whether respondent's firm represented other clients in this litigation who might have had potentially conflicting interests.

The record discloses that Judge Shuster became an interested party in the litigation in April 1987. Whether or not members of respondent's firm may have mentioned Judge Shuster's involvement in conversations with other plaintiffs, Mr. Haselden testified that he was never advised that Judge Shuster was a client of respondent's firm. Similarly, although clients Larry Haywood and Fred Miller

were identified as clients designated by the firm as liaisons to disseminate information to the other plaintiffs, the panel found that neither Mr. Haywood nor Mr. Miller learned that Judge Shuster was a client of the firm until June 1994. There is simply no evidence in the record that respondent or his law firm advised the Haseldens that the land owner on the opposite side of the subject right-of-way was also a client of the firm for purposes of the litigation. Nor is there evidence in the record suggesting that direct communication with the Haseldens, by letter, by telephone or in person, would have been impractical or burdensome.

As the comment to MRPC 1.4 makes clear, adequacy of communication depends in part on the kind of advice involved and a lawyer is not ordinarily expected to describe trial or negotiation strategy in detail. From the Haselden's perspective, however, respondent's inclusion of Judge Shuster in the class of persons who would ultimately benefit from the law suit was a relevant consideration. This was true both because of the apparently preferential treatment afforded to Judge Shuster at the time he retained respondent and because of the obvious potential for conflict between the Shusters and the Haseldens.

First, it does not appear that the Haseldens (or the other clients who were required to pay a $250 retainer) were informed that at least one "interested party" (Judge Shuster) was afforded full rights and benefits as an interested party without having to pay an initial retainer. Without this information, the Haseldens were prevented from making an informed decision about the nature and quality of their representation.

Secondly, while it is true that the initial focus of the litigation was to wrest control of the entire right-of-way from Penn Central without regard to the potentially competing claims of the adjoining property owners, Judge Shuster's potential interest in a portion of the right-of-way was, by 1991 and 1992, clearly relevant to the Haselden's ability to make an informed decision as to the ultimate outcome of the litigation. This was especially true in light of the letter from respondent's firm to the Haseldens dated April 27, 1992 (petitioner's exhibit #6). The implication of

that letter was that the property owners not named as plaintiffs in the law suit were "totally unaffected by this suit at this point." It was foreseeable that this letter would bolster the Haselden's expectation that since Shuster was not a named plaintiff, he would not have a chance to claim a portion of the right-of-way and that the Haseldens, in turn, could expect an opportunity to purchase the entire 3.03 acres.

Accordingly, we reverse the hearing panel's dismissal of the charges of misconduct arising under MRPC 1.4. This matter is remanded to the hearing panel for a hearing to determine the appropriate level of discipline as required by MCR 9.115(J)(2).

Board Members George E. Bushnell, C. H. Dudley, M.D. Elaine Fieldman, Albert L. Holtz, Miles A. Hurwitz, Michael R. Kramer and Kenneth L. Lewis concur.

Board Member Barbara B. Gattorn was absent and did not participate.