GRIEVANCE ADMINISTRATOR,
Petitioner/Appellant,
v
LEONARD R. ESTON, P-13231
Respondent/Appellee.

File No. DP 75/85

Argued: April 15, 1987
Decided: July 7, 1987

OPINION OF THE BOARD

The Hearing Panel found, by a majority, that Respondent's neglect of a criminal appeal as alleged in Count I of the Formal complaint warranted a suspension of three months. The Panel further concluded that Respondent's neglect of a second criminal appeal (Count II), his failure to cooperate with an investigation by the United States District Court Magistrate into his handling of that appeal (Count III), and his false statements to the Magistrate (Count IV) required an additional consecutive suspension for one year.

The Grievance Administrator has filed a Petition for Review seeking an increase in the discipline imposed in view of the nature of the misconduct and Respondent's prior sixty day suspension in May 1986.

In the Petition for Review fined by the Respondent it is claimed that he was denied due process of law and the Petition cites an alleged bias on the part of the Panel Chairman, the Panel's consideration of transcripts and exhibits from a Show Cause proceedings before a Federal Magistrate, and the length of time taken by the Panel to submit its written report. These arguments were subsequently restated by the Respondent in further pleadings filed with the Board in a nature of a Motion to Strike the Majority Report and a Motion to Vacate the Hearing Panel Order of Discipline.

Finally, the Grievance Administrator filed a Motion for Sanctions in accordance with MCR 2.114(E) seeking costs and attorney fees incurred in preparing responses to pleadings alleged to be unwarranted and frivolous.

The Order of the Hearing Panel suspending Respondent's license to practice law for a period of fifteen months is affirmed in all respects upon our finding that there is proper evidentiary support in the whole record for the Panel's decision See Grievance Administrator v Crane, 400 Mich 484 (1977); In Re Del Rio, 407 Mich 336 (1979). For the reasons stated below, we conclude that the arguments raised by Respondent in support of the Motion to Quash and the Motion to Vacate are lacking in merit and those Motions are denied. While the pleadings filed by Respondent are, as alleged by Counsel for the Grievance Administrator, characterized by citations of questionable relevance and misspellings, the Board is reluctant to ascribe those deficiencies to bad faith. The Grievance Administrator's Motion for Sanctions is denied.

At the commencement of the proceedings, Counsel for the Grievance Administrator offered into evidence his Exhibits marked 1-18. Exhibits 1-16 were admitted without objection by Respondent. The transcripts of Show Case Proceedings held before U.S. Magistrate Stephen Pepe, Exhibits 17 and 18, were admitted over Respondent's sole objection that he did not know at the time that his sworn statements to the U.S. Magistrate might be the subject of an investigation by the "State Bar Grievance Board" (sic).

While the separate report of the dissenting panel member stresses the administrator's failure to present "live witnesses", the hearing panel majority found that the allegations of misconduct were established by a preponderance of the evidence presented. There is no requirement in the court rules that "live" testimony is necessarily to be favored over documentary evidence. On the contrary, documents prepared at the time of the events in question may often be more reliable than the recollections of participants or observers to those events. Moreover, while counsel for the grievance administrator was willing to rely solely upon the exhibits in support of the allegations of misconduct, the respondent did testify on his own behalf and the credibility of his testimony was placed before the panel. The Board has traditionally deferred to a Hearing Panel's assessment of credibility, Schwartz v Sauer, DP 25/84, Attorney Discipline Board 1985 (Opinions of the Board, page 359).

The Report of the majority in this case reflects the Panel's careful consideration of the testimony offered by Respondent and its close scrutiny of the Exhibits as evidenced by the thorough discussion of the charges and the proofs offered by the parties. The findings of the majority are accompanied by numerous references to the evidence presented. Our review of that record convinces us that there is ample evidentiary support for the Panel's conclusion as to Count I that Respondent agreed to pursue an appeal on behalf of Leslie Wilson but that his failure to take action or to withdraw from representation, despite his client's complaints, constituted professional misconduct.

The dissenting panel member observed that "the grievance in Count I was initiated by the Grievance Commission and not by Leslie Wilson who obviously did not concur in the allegations of misconduct". In fact, the record clearly establishes that the Complainant, Leslie Wilson, did file a grievance against the Respondent in the form of a Request for Investigation and the Respondent's Answer to that Request for Investigation, dated May 6, 1985 was received by the Panel as Grievance Administrator's Exhibit No. 8. Furthermore, the concurrence of Complainant Wilson was not required inasmuch as the unwillingness of a Complainant to prosecute does not effect the right of the Administrator to proceed. MCR 9.115(B). Support for the majority's conclusion as to Count I is found in those Exhibits which establish that Respondent's client wrote to the United States Court of Appeals, Sixth Circuit, on May 22, 1983, June 1, 1983 and September 6, 1983 and that Respondent was removed by the Court on January 24, 1984 following his failure to take the action required by the Court's written Orders on September 9, 1983 and November 22, 1983.

Count II of the Formal Complaint charged that the Respondent was retained in August 1983 to research and prepare post conviction proceedings in connection with the criminal conviction of one Andrew Leonard, but that the Respondent failed to take action on his client's behalf from August 1983 to December 27, 1983 and failed to return his client's documents and/or retainer following his discharge as Mr. Leonard's attorney. Count III charged that Respondent's failure to return the $1,000 retainer paid to him by Mr. Leonard was referred to a Magistrate for the United States District

Court, Eastern District, Southern Division, for investigation, but that the Respondent failed to return the Magistrate's phone calls and failed to deliver pleadings which were alleged to have been completed on or before March 9, 1984. Count IV charged that Respondent's failure to cooperate with the Magistrate's investigation resulted in Show Cause Proceedings during which the Respondent gave false testimony to the Court that he had not received his client's discharge letter, that he conducted legal research and drafted pleadings prior to December 1983 and that the pleadings promised to the Magistrate in February 1984 were not sent only because Respondent was ashamed to send handwritten drafts.

As with their findings as to Count I, the conclusions of the majority as to Counts II, III and IV are based upon a fair appraisal of the record before them and there is compelling evidentiary support for those findings. As the Majority Report points out, Respondent's sworn testimony to the United States Magistrate and to the Hearing Panel contains contradictions which cannot be reconciled. In assessing Mr. Eston's credibility, the Panel was not merely faced with the problem of weighing his statements against other evidence. Respondent's own testimony raises serious questions. On the issue of when the typed version of the brief for Mr. Leonard was actually typed, for example, Respondent Eston testified that it had been typed in December 1983 (Tr. p 70, 73) or January 1984 (Tr. p. 62-63; 73) or March 1984 (Tr p. 63-64; 67) or April 1984 (Tr. p. 64-65; 67).

The Respondent further argues that the Panel's consideration of the transcript of the Show Cause Proceedings before the U.S. Magistrate constituted a "fundamental unfairness" because the Respondent was never advised that his testimony to the Magistrate could be used against him in a Grievance proceeding. According to the Respondent, he was entitled to a Miranda warning that his voluntary sworn statements to a Magistrate concerning his representation of a client could be introduced in subsequent State disciplinary proceedings and Respondent cites State Bar v Woll, 387 Mich 154 (1972) in support of his argument that "the lack of notice violated his fifth Amendment Right against self-incrimination" [sic].

In the Woll case, the Respondent answered all questions directed to him except for a single question posed by a panel member asking whether he had ever employed anyone to solicit cases for him. The Respondent refused to answer that question, citing his Fifth Amendment right. In closing arguments, counsel for the Grievance Administrator drew the Panel's attention to Respondent's invocation of his Fifth Amendment right and requested that the Panel draw the inference that Respondent invoked the privilege because he had something to hide. The specific issue before the Court in that case was whether or not those comments by the Grievance Administrator's counsel were improper and the Court ruled: 1) that a disbarment proceeding is quasi-criminal in nature citing Matter of Baluss, 28 Mich 507 (1874), 2) that the privilege against self-incrimination does apply in disciplinary proceedings, citing Spevack v Klein, 385 U.S. 511, 87 S.Ct. 625, 17 L.Ed. 2d 574, (1967) and 3) that comments made to a fact-finding body by a prosecutor concerning an accused silence are prohibited by the self-incrimination clause of the Fifth Amendment to the U.S. Constitution.

It is not apparent to the Board how the Court's ruling in Woll is applicable to the case before us. Respondent Eston did state to Magistrate Pepe that he felt the magistrate lacked jurisdiction to conduct an inquiry but Respondent agreed to testify under oath and did not assert any claim under

the Fifth Amendment. In the disciplinary proceedings before the hearing panel, Respondent was not called as a witness by the Grievance Administrator but testified voluntarily on his own behalf, again without raising the issue of a privilege against self-incrimination. We are not presented with any claim that he was prevented from asserting that privilege. Since the privilege was never invoked by Respondent there were, of course, no comments by the prosecutor on that subject. The Board is aware of no authority in support of Respondent's position that attorneys who testify voluntarily in federal proceedings are entitled to a special warning that false testimony may result in disciplinary action or that such testimony may be used for purposes allowed by the Michigan Rules of Evidence.

The Panel's consideration of the transcripts of Respondent's testimony before Magistrate Pepe is also the subject of Respondent's "Motion to Vacate and Reverse Disciplinary Order", in which it is argued that Respondent had no opportunity to review those transcripts prior to their admission into evidence, that the transcripts were the only evidence used by the Grievance Administrator in the presentation of his case and that Respondent was prejudiced by the use of the transcripts for impeachment. These arguments must be rejected.

A pre-trial conference was held in this matter on August 29, 1985, and it is clear that counsel for the Grievance Administrator served notice that he intended to introduce those transcripts. Upon Respondent's written demand in accordance with MCR 9.115(F) (4), the Administrator was required to make those documents available for inspection or copying. There is no evidence in the record that Respondent or his counsel requested such an opportunity to review the transcripts. At the commencement of the trial on March 12, 1986, no objection was made to the introduction of those transcripts on the grounds that the Administrator had failed to comply with the applicable rules of discovery in these proceedings. Respondent's first claim that he was denied an opportunity to review any documents is contained in a Motion to Vacate filed March 20, 1987 more than one year after the hearing. As for the other issues presented in that Motion, we agree with the Respondent's contention that the transcripts in question "were used by the Petitioner to impeach the Respondent and to make it appear as though Respondent was testifying falsely." Respondent testified under oath in proceedings before a federal magistrate. He testified under oath to the Hearing Panel. Respondent presents no rule of law under which it was improper for the Hearing Panel to draw certain inferences from the fact that Respondent offered sworn testimony which could not be reconciled with his prior statements.

Finally, Respondent's pleading entitled "Motion to Quash and Strike Majority Discipline Order" is based upon allegations that the Hearing Panel Chairman Richard Kitch was biased or prejudiced against the Respondent. The basis for this claim appears to be the appearance of Chairman Kitch's law firm on behalf of a defendant in a civil action brought by Respondent as counsel for the plaintiff.

The trial of this disciplinary matter was concluded on March 12, 1986. The appearance of the Kitch law firm on behalf of the defendant In the Matter of Cole v Vatsis, was filed May 22, 1986. Respondent made no objection to the presence of Mr. Kitch on the Panel at that time but waited approximately nine months to raise the claim of bias. The claim of bias itself is made without a single allegation that the Hearing Panel Chairman had any personal involvement or knowledge of the civil proceedings involving other attorneys from his law firm. While a timely objection might have warranted consideration, we harbor grave concern as to the motive for the filing of this Motion.

A decision of the Hearing Panel in this case reflects the majority's conclusion that Respondent's neglect of an appellate matter on behalf of Leslie Wilson, as alleged in Count I of the Complaint, was overshadowed by the neglect of a legal matter entrusted by Andrew Leonard, compounded by failure to respond truthfully to the inquiries of Magistrate Pepe. The fifteen month suspension imposed by the Hearing Panel is apportioned between the three month suspension attributable to the neglect alleged in Count I and a consecutive twelve month suspension resulting in the findings of misconduct as alleged in Counts II, III and IV. Having reached our conclusion that the factual findings of the Hearing Panel majority should be affirmed, the Board now considers the Grievance Administrator's argument that the serious nature of the misconduct in this case warrants greater discipline.

The Board has stated in the past that when assessing appropriate discipline, it will assess its broader overview to assure reasonable uniformity among the numerous volunteer hearing panels. In the Matter of Robert A. Grimes, #35939-A, January 9, 1981 (Brd. Opn. p. 118). In this case, the fifteen month suspension imposed by the Panel is not inconsistent with the goals of these disciplinary proceedings and is not incompatible with previous orders of the Board. The fifteen month suspension, consisting of consecutive suspensions of three months and one year, is affirmed.