

Grievance Administrator,
State of Michigan
Attorney Grievance Commission,

Petitioner/Cross-Appellant,

v

Gary M. Wojnar, P 41179

Respondent/Appellant.

Case No. 91-174-GA

Decided: October 28, 1994

BOARD OPINION

The panel ruled that the Grievance Administrator established the allegations of professional misconduct alleged in Counts II and III of the complaint. Count II charged that the respondent was retained to file an appeal in a criminal matter but failed to file a claim of appeal and failed to keep his client informed regarding the status of that appeal. Count III charged that the respondent violated his duties to be truthful by falsely advising his client that an appeal had been filed in the Michigan Court of Appeals when he knew that that statement was false.

Following a separate hearing to determine the appropriate level of discipline, the panel ordered that the respondent's license to practice law should be suspended for a period of ninety days. The panel further ordered that during the suspension, and for a one year period after automatic reinstatement, the respondent should be subject to certain conditions in accordance with MCR 9.106(2): 1. evaluation by a qualified substance abuse therapist; 2. therapy for substance abuse, if warranted; 3. abstinence from any controlled substances as defined by MCLA 333.7104(2); 4. abstinence from the abuse of alcohol; 5. submission to periodic drug tests.

Both parties petitioned for review. The Grievance Administrator argued that the established misconduct warranted a suspension of sufficient length to require reinstatement proceedings. The respondent argued that a ninety day suspension was unduly harsh and that the conditions imposed by the panel were inappropriate in light of the respondent's adamant denial that he had used any controlled substance.

On December 7, 1993, the Board remanded this matter to the

panel for a further hearing on discipline. Both parties were given the opportunity to present evidence tending to support or refute

allegations that the respondent engaged in the use of a controlled substance and the extent to which that use, if established, should be considered in the imposition of discipline.

The panel concluded that its original report and order of suspension, with conditions, should be affirmed. Both parties filed written objections to the panel's supplemental report.

We conclude that the discipline in this case should be increased to a suspension of 180 days. In the absence of substantial aggravating or mitigating factors, the established misconduct in this case warrants a suspension of sufficient length to require reinstatement proceedings.

In Matter of Ann Beisch, ADB DP 122/85 (Brd. Opn. 2/8/88), the Board was presented with acts of misconduct similar to those established in this case. Respondent Beisch failed to file a timely appeal on behalf of a client in a criminal matter and misrepresented the status of the appeal to her client. The panel further found that the respondent's answer to the request for investigation was not entirely truthful. In its opinion accompanying its order increasing a suspension from 30 days to 120 days,¹ the Board acknowledged the respondent's lack of prior discipline and lack of deliberate or calculated attempts to injure the client but focused on the gravity of the respondent's misrepresentation to the client. The Board concluded,

"We agree with the hearing panel that the respondent's inexperience contributed to her inability to be entirely candid with her client when faced with a situation in which she could not possibly satisfy her client's expectations. Respondent's reaction was clearly inappropriate. Protection of the public and the legal system as whole requires that reinstatement of respondents license to practice law in this state, be conditioned upon her affirmative showing, [of her fitness to practice law] in reinstatement proceedings described in MCR 9.123(B) and MCR 9.124. We therefore increase the discipline in this case to a suspension of 120 days."
(Beisch Pg 3)

As the respondent has emphasized on appeal, the hearing panel dismissed those counts in the formal complaint based wholly or in part on allegations that the respondent used cocaine or accepted cocaine as payment for his legal services. There is evidentiary

¹The then existing language of MCR 9.123(B) required the filing of a petition for reinstatement in all cases involving suspensions greater than 119 days. Effective March 1, 1994, that rule was amended and the minimum suspension requiring reinstatement proceedings is now 180 days.

support in the record for the panels dismissal of those charges and we agree with the respondent's assertion that he should not be disciplined for misconduct charges which were not established by a preponderance of the evidence.

We do not believe, however, that the hearing panel intended the conditions involving drug screening, therapy or drug testing to constitute "discipline" in a punitive sense. Rather, the hearing panel attempted to impose purely remedial conditions, within the spirit of MCR 9.106(2) by providing a program of rehabilitation. We hasten to emphasize that this was an appropriate action on the panel's part and that the attempt to impose conditions related to a perceived substance abuse problem was not inconsistent with the dismissal of those counts based partially upon allegations of drug use or possession.

However, we are presented with a dilemma. The respondent emphatically denies the existence of the problem which the hearing panel has attempted to address with remedial conditions. Under these circumstances, we are inclined to agree with the respondent that conditions relating to a perceived substance abuse problem would be of little or no value to either the respondent or the public. We therefore eliminate the conditions imposed by the hearing panel requiring drug screening, counselling and drug testing.

As noted above, the contradictory testimony in this case regarding the respondent's alleged use of controlled substances is relevant to the level of discipline and not to the established charges of misconduct. Therefore, we neither affirm nor reverse the hearing panels findings and conclusions regarding respondent's alleged cocaine use and we review the level of discipline in this case without reference to that issue.

The respondent has been found to have neglected a criminal appeal and to have made false statements to his client concerning the status of that appeal. Notwithstanding the mitigating effect of respondent's prior unblemished record, the respondent's violation of his fundamental obligation to be truthful to his client when discussing a material matter requires reinstatement proceedings under MCR 9.123(B) and MCR 9.124.

Board members Marie Farrell-Donaldson, Barbara B Gattorn, Albert L Holtz and Miles A Hurwitz concur.

Board member Linda S Hotchkiss, M.D. would affirm the hearing panel's order.

Board Chairperson Elaine Fieldman would affirm the ninety-day suspension imposed by the panel but would vacate the conditions imposed in accordance with MCR 9.106(2).

Board members John F Burns, George E Bushnell, Jr, and C Beth DunCombe did not participate.

