Grievance Administrator,
State of Michigan
Attorney Grievance Commission,

Petitioner/Appellant,

v

Elliot B Allen, P 40394,

Respondent/Appellee.

92-219-GA; 92-237-FA

Decided: June 24, 1994

BOARD OPINION

An Order of Reprimand, with conditions pursuant to MCR 9.106(3), was entered by the hearing panel based upon its conclusion that professional misconduct had been established as follows: the respondent failed to take timely action on behalf of a client in a probate matter and failed to appear for a hearing on his client's behalf in violation of MCR 9.104(1-4) and the Michigan Rules of Professional Conduct (MRPC) 1.1(c), 1.2(a), 1.3, 3.2 and 8.4(a-c); the respondent failed to answer a Request for Investigation in violation of MCR 9.104(1-4,7), MCR 9.103(C), MCR 9.113(B)(2) and the MRPC 8.1(b) and 8.4(a,c); and the respondent failed to answer formal complaint 92-219-GA, in violation of MCR 9.104(1,2,4,7) and MRPC 8.1(b), 8.4(a,c). The panel concluded that Count II of the Complaint 92-219-GA was not established by a preponderance of the evidence and that count was dismissed.

The Grievance Administrator filed a Petition for Review on the grounds that the panel erred in dismissing Count II of Complaint 92-219-GA. The Grievance Administrator also seeks an increase in the level of discipline. Based upon a review of the whole record, the Board concludes that the hearing panel's dismissal of Count II of complaint 92-219-GA cannot be supported in light of the evidence presented. Dismissal of Count II is therefore reversed. Discipline in this case is increased to a suspension of forth-five days accompanied by conditions described more fully below.

Formal Complaint 92-219-GA, Count II, charged that the respondent was retained on November 18, 1991 to represent a client in a state civil service grievance proceeding which was scheduled for hearing on November 21, 1991. On the day of hearing, the respondent negotiated a settlement on his client's behalf which called for his client's reclassification effective December 9,

1991. The client signed a written agreement embodying the terms of this settlement on January 13, 1992. Count II charged that the

respondent violated his duties and responsibilities to his client by failing to notify her of a subsequent change in the agreement regarding the effective date of the reclassification, by failing to protest the change regarding the effective date of reclassification and by failing to notify his client of the possible legal consequences of that change. Respondent's conduct was alleged to be in violation of MCR 9.104(1-4) and the Michigan Rules of Professional Conduct (MRPC) 1.1(c; 1.2(a); 1.3; 3.2; and 8.4(a-c).

At the hearing before the panel, the petitioner presented the testimony of Dinah Johnson Moore, the Michigan Department of Corrections employee who handled the grievance filed by respondent's client, Ursula Williams. Ms Moore testified that a settlement was reached between the parties at the scheduled hearing on November 21, 1991 and that on the following day, November 22, 1991, she faxed a written settlement agreement to the respondent setting the effective date of the reclassification as December 9, 1991. She testified that this date was selected because it was one and one-half pay periods after the hearing time and would allow sufficient time for the Department of Corrections to submit the necessary documents for Ms Williams' reclassification. (Tr.p. 74)

There appears to be no question that if the agreement had been promptly signed and returned, the reclassification could have been implemented by the proposed date of December 9, 1991. However, Ms Moore testified, because the agreement was not returned until February 1992, she then called the respondent and explained that the applicable civil service rules barred retroactive reclassification pursuant to a grievance settlement. She testified that it was agreed by telephone, and confirmed by letter, that the effective date of reclassification in the settlement agreement would have be modified to conform to the civil service rules.

The essence of Count II is that the respondent failed to notify his client that there had been a change as to the effective date of reclassification. There is no dispute in the record on this point. The respondent admitted that he did not tell his client that the document which she had signed had subsequently been changed. (Tr. p 32 & 34)

In reviewing a hearing panel decision, the Board must determine whether those findings have proper evidentiary support in the whole record. Grievance Administrator v August, 438 Mich 296 (1991), In re Grimes, 414 Mich 483 (1982). Applying that standard, we affirm the hearing panel's decision to dismiss Count II sub-paragraph D(ii) which charged that the respondent "failed to protest the change regarding the effective date of the reclassification". Even in hindsight, it was not clearly shown what further action could have been taken on the client's behalf once the December 9, 1991 reclassification date had passed in light of the unrebutted testimony that a retroactive reclassification was not possible.

However, review of the record establishes that the allegations of Count II sub-paragraph D(i) and (iii), that the respondent failed to notify his client that the agreement was modified and that he failed to advise his client of the legal consequences of that modification established by evidence which was unrebutted. As noted above, the respondent admitted his lack of communication with his client regarding the modification of the effective date of reclassification.

Although the respondent's lack of communication on this important aspect of the settlement agreement would appear to constitute a violation of MRPC 1.4(a,b), violation of that rule was not charged in the formal complaint nor was there a subsequent motion to amend the complaint.

We find, however, that the respondent's admitted failure to communicate with his client on a key provision of her settlement agreement constituted neglect of a legal matter entrusted to the respondent within the meaning of MRPC 1.1(c) and was contrary to that portion of MRPC 1.2(a) which directs that "A lawyer shall abide by a client's decision whether to accept an offer of settlement or mediation evaluation of a matter". The evidence is clear in this case that respondent's client accepted and signed a settlement agreement calling for reclassification of her position effective December 9, 1991. Respondent's agreement to change that provision without notice to his client was improper. We do not reverse the hearing panel's dismissal of MCR 9.104(1-3) and MRPC 1.3; 3.2; and 8.4(a-c).

In considering the issue of the appropriate level of discipline, we note the similarities between the circumstances presented in this case and those found in Matter of Alvin McChester, 93-132-GA; 93-168-FA. In a February 2, 1994 opinion increasing discipline in that case from a suspension of thirty days to a suspension of 180 days, we stated:

> "Considered separately, the panel's decisions to impose a reprimand for the neglect and non-communication charged in 93-132-GA, Count I, a reprimand for similar misconduct charged in Count II and a thirty-day suspension for the failure to answer a Request for Investigation charged in Count III would appear to be appropriate, absent aggravating or mitigating factors. We do not believe, however, that the separate charges can or should be considered as separate unrelated events.
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> An attorney's pattern of misconduct is recognized by the American Bar Associations' Standards for Imposing Laywer Sanctions (1986) Sec. 9.22(C). Similarly, the Board has

> recognized the aggravating effect of an attorney's pattern of misconduct as, for example, in Matter of Fazio, DP 36/82, 1983, Opn. of Brd. p. 294 [increasing suspension from ninety days to 121 days]. Matter of Alvin McChester, Brd. Opn. 2/2/94, p.2.

Unlike McChester, respondent Allen did not fail to appear or answer at any stage of the proceedings and we are unable to conclude that a suspension requiring reinstatement proceedings is warranted in this case. Nevertheless, the pattern of misconduct presented by the respondent's neglect of a probate matter, his failure to communicate adequately with clients, his failure to answer a Request for Investigation and his failure to file a timely answer to a formal complaint does warrant a suspension of forth-five days.

Finally, we have reviewed the conditions imposed by the hearing panel in its order of December 14, 1993. Those conditions are appropriate in light of the nature of the established misconduct and the testimony presented by the respondent regarding his office procedures and his desire to seek psychological counseling. Those conditions are therefore adopted with the following modifications:

> 1) Respondent shall make restitution to his former client Anne Taylor in the amount of $600.00;
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> 2) Following the respondent's reinstatement pursuant to MCR 9.123(A), respondent shall meet no less than once a month for a period of one year with a practicing attorney to be appointed by the Attorney Discipline Board. That attorney shall serve as a monitor for purposes of reviewing the respondent's office procedures, including scheduling and diary procedures, as well as the respondent's knowledge of procedural and substantive law. The monitor shall file quarterly reports with the Grievance Administrator and the Attorney Discipline Board;
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> 3) The respondent shall treat with Dr Leonard E Ellison, M.D. for a period of one year, commencing the date of this order. Respondent shall see Dr Ellison at intervals recommended by Dr Ellison, but no less than bi-weekly unless otherwise ordered by the Board. Respondent shall file a written statement with the Board and the Grievance Administrator every two months listing the dates that he has

> seen Dr Ellison during the previous two-month period. Dr Ellison shall file a report with the Administrator and the Board every ninety days regarding the respondent's continued treatment and his continued mental and/or emotional fitness to engage in the active practice of law.

In addition to the above conditions imposed by the panel, the Board imposes the further condition that the respondent shall, within six months following his reinstatement in accordance with MCR (.123(A), complete at least two courses offered by the Institute for Continuing Legal Education (or specifically approved by the Board) on the practice aspects of law office management and professional ethics.

Concurring: John F Burns, Marie Farrell-Donaldson, Elaine Fieldman, Barbara B Gattorn and Miles A Hurwitz.

Board Members George E Bushnell, Jr and Linda S Hotchkiss, M.D. concur in the result but would affirm the hearing panel's dismissal of Count II of Formal Complaint 93-219-GA.

Board Members C Beth DunCombe and Albert L Holtz did not participate.