Grievance Administrator
State of Michigan
Attorney Grievance Commission

Petitioner/Appellant,

Allan Falk,

Complainant/Appellant,

V

George R. Darrah, P12510

Respondent/Appellee.

Case No. 92-201-GA

Decided: March 29, 1994

BOARD OPINION

In representing a criminal defendant who had been diagnosed as schizophrenic, respondent asked the Court to proceed with a trial and impose a prison sentence, contrary to his client's expressed desires. Respondent took these actions because he felt it would be good for his client. The hearing panel found that this conduct did not constitute professional misconduct and dismissed the complaint.

The complainant and the Grievance Administrator each filed a petition for review. We vacate the hearing panel order of dismissal and order that the respondent be reprimanded.

We conclude that while respondent may have truly believed he was acting in the client's best interest, his conduct violated DR-7-101 (A)(1) of the Code of Professional Responsibility.[1]

In November, 1985 respondent entered his appearance in Genesee Circuit Court on behalf of a defendant charged with arson at an apartment complex for senior citizens and disabled persons. The

[1] The Grievance Commission charged respondent with other incidents of misconduct in connection with his defense of this criminal defendant. We agree with the hearing panel's dismissal of those charges.

defendant had been treated and hospitalized for schizophrenia over a ten year period. Respondent was serving as the defendant's

conservator at the time of her arrest and trial. The Circuit Court initially determined that the defendant was not competent to stand trial. At a subsequent hearing, the Court found that she was competent.

Before trial, the client stated on the record that she wanted the case adjourned so that she could go to a hospital and get help and that she was under too much stress. Respondent contradicted his client's expressed request and told the Court that in his opinion a trial would "be good for her:"

> I would point out, your honor, that this is a lady who has never faced stress. She always tries to run from it. I don't think it's going to--this may sound harsh--I think making her stand trial might be good for her. It's going to be very difficult because I know she will interrupt, and everybody knows she's going to have trouble. But if she stands trial and gets through it, I think it will benefit her and I know it sounds strange, but that's what I have.

Exhibit 10, p 11-23.

The jury found the defendant guilty but mentally ill of arson. At sentencing, the defendant asked for probation. Respondent again ignored his client's position and stated what he believed to be best for the client. He told the Court that although his request was "bad form," it would be "much better for her" if she were imprisoned. Exhibit 13, p 12-13.

The hearing panel essentially concluded that respondent's conduct did not amount to professional misconduct because his failure to support the client's requests did not make any difference in the outcome of the trial or the sentence imposed by the judge.

In reviewing a decision of a hearing panel, the Attorney Discipline Board must determine whether the panel's findings have proper evidentiary support on the whole record. Grievance Administrator v August, 438 Mich 296, 304 (1991); In re Grimes, 414 Mich 483; 326 NW2d 380 (1982). At the same time, however, the Board possess a measure of discretion with regard to its ultimate decision. Grievance Administrator v August, supra at 304; Matter of Daggs, 411 Mich 304; 307 NW2d 66, 71 (1981).

We disagree with the panel's conclusion that respondent's conduct did not violate Canon 7 of the former Code of Professional Responsibility, DR 7-101(A)(1). The sub-rule states:

> A) A lawyer shall not intentionally:
>
> 1) Fail to seek the lawful objectives

> of his client through reasonably available means permitted by law and the disciplinary rules, except as provided by DR 7-101(B)...

Respondent's actions in contradicting his client's requests and his urging to the Court to act contrary to the client's wishes fall within DR 7-101(A)(1).

The hearing panel properly concluded that the respondent's representation of the criminal defendant did not violate the cited provisions of Canon 6 of the former Code of Professional Responsibility, DR 6-101(A)(1-3). That disciplinary rule read:

> (A) A lawyer shall not:
>
> 1) Handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it.
>
> 2) Handle a legal matter without preparation adequate in the circumstances.
>
> 3) Neglect a legal matter entrusted to him.

While respondent made certain decisions during his representation of this client which were subsequently challenged on appeal in the form of a claim of ineffective assistance of counsel, the evidence did not establish that the respondent knew or should have known that he was not competent to handle this type of case, or this particular case; that he failed to prepare adequately under the circumstances; or that he neglected this legal matter.

We also agree with the hearing panel's conclusion that the evidence did not support a finding that the respondent's conduct adversely reflects on his fitness to practice law and therefore violated the provisions of Canon 1, DR 1-102(A)(6).

The Michigan Court of Appeals held that respondent's conduct had deprived his client of effective assistance of counsel. Our decision to enter a finding of professional misconduct is based upon the applicable provisions of the Code of Professional Responsibility and is not based upon the decision of the Court of Appeals. A hearing panel of the Attorney Discipline Board considering charges of professional misconduct in sui generis disciplinary proceedings conducted under sub-chapter 9.100 of the Michigan Court Rules is not an inferior tribunal of the Michigan Court of Appeals. That court has "no role in disciplinary proceedings." Sternberg v State Bar of Michigan, 384 Mich 588 (1971). This proceeding is not governed by the decision of the Court of Appeals under the principle of stare decisis.

Having found professional misconduct under the facts of this case, we address the question of discipline.

The hearing panel found that the respondent believed, in good faith, that he was acting in his client's best interest. While such a belief did not relieve the respondent of certain fundamental obligations to his client, significant weight may be assigned to that finding as a mitigating factor. We concur with the hearing panel's conclusion that the respondent was presented with extremely limited options in his representation of the criminal defendant and had to contend with inclusive or conflicting psychiatric evaluations, a difficult case in front of a very strong and determined trial court, and a manipulative client whose conduct during the trial was often abusive, hostile or simply bizarre.

Respondent, a practicing attorney for 32 years, has been reprimanded in 1987 and 1992. We have considered the aggravating affect of these reprimands but find that, taking all of the somewhat unusual factors in this case into consideration, a suspension of the respondent's license to practice law is not warranted in order to achieve the overriding goal of these disciplinary proceedings, that is, the protection of the public, the courts and the legal profession. The hearing panel's order of dismissal is vacated and the respondent is reprimanded.

Board Members John F. Burns, C. Beth DunCombe, Elaine Fieldman and Miles A. Hurwitz concur.

Board Members George E. Bushnell, Jr. and Theodore P. Zegouras did not participate.