

IN THE MATTER OF ARTHUR W. WHELAN
A Member of the State Bar of Michigan,
Respondent,
File No. DP-7/81

Decided: August 12, 1982

OPINION OF THE BOARD

Respondent was appointed as counsel for an indigent criminal appellant, the complainant in this matter. Several factors beyond Respondent's control contributed to delays in the appeal; however, Respondent's lack of attention and failure to exert control and make decisions determining the course of the appeal exacerbated the delays. Complainant's appeal was denied on the merits and Complainant filed a grievance against Respondent. The hearing panel found the allegations of misconduct to be unsupported by the evidence and dismissed the Formal Complaint. Complainant petitions the Board for review; we reverse and issue a reprimand.

Complainant was convicted of assault on September 15, 1976 in Macomb County Circuit Court. Complainant's trial counsel died three days after the trial ended. Respondent, who shared office space with the deceased trial attorney (they were not partners in practice), agreed to be Complainant's appellate counsel and was so appointed by the Court.

Respondent moved for a new trial. However, before the Motion could be heard by the trial judge, the trial judge was appointed to the Court of Appeals. The trial judge's replacement recused himself because of a conflict of interest. The Motion for New Trial was finally decided by a third judge on June 7, 1979.

Communication between Respondent and Complainant was infrequent and incomplete. Although Complainant demanded that he be actively involved and included in the drafting of appeal pleadings, he was not always quick to assist counsel. However, Respondent's pursuit of Complainant's input, especially concerning the factual issues of the case, was less than persistent. While Complainant's criminal appeal was filed June 26, 1979; it was not denied until August 1, 1980.

In reaching a decision, the Board again recognizes that there were a number of unfortunate events which resulted in the delay. These are factors which the Board, after a careful review of the record and questioning of the parties during oral arguments, can view only as mitigation and not as a defense to the charges in the Formal Complaint.

In the case In re Daggs, 1 Mich Discip Rptr 178 (1979), we stated that the rights of the client in a criminal appeal and the severe strain on the client during the appeal period make the timely handling of criminal appeals a matter of particular importance. See also In re Harrington, 1 Mich Discip Rptr 75 (1979).

The client was allowed too much time and judgment in the research and drafting of the appeal. Respondent should have maintained firm control of the appeal, rather than advocate the judgment and decision-making role to his client. As appellate counsel, it was Respondent's duty to go forward with the action, notwithstanding the complainant-prisoner's failure or inability to supply him with information. The extreme deference to the client in this matter exacerbated the already inordinate delays which were known to Respondent. The client, in effect, replaced Respondent as the party controlling and pursuing the appeal.

The Board holds that it is the attorney's duty to decide upon appeal arguments and issues to be raised and developed. Although client input is always proper and indeed essential, Respondent cannot use this fact to excuse the extensive delays which occurred in this matter.

The panel order of dismissal is vacated and an order of reprimand shall be entered.

Chairman Cote', Vice-Chairperson Shecter, Board Member Farhat, Board Member Kern, and Board Member Reamon Concur.

Board Secretary David B. Lewis, dissents as follows:

I would respectfully dissent from the decision of the Board, keeping in mind the importance of the actual testimony to hearing panel findings. Also, restraint should apply when modifying panel findings, absent some error or indication that the findings are unsupported by the preponderance of the evidence. The delay in processing the appeal in question resulted from a number of compelling and unavoidable circumstances, including the Complainant's own control over the matter. I would affirm the panel's decision.