

STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,
State of Michigan
Attorney Grievance Commission,

Petitioner/Appellant,

v

Norris J. Thomas, Jr., P 21383,

Respondent/Appellee.

Case No. 91-205-GA

Decided: December 8, 1992

BOARD OPINION

The formal complaint charged that the respondent agreed in September 1986 to file a petition for writ of habeas corpus on behalf of an appointed client in a criminal case but that during the course of the next three years he failed to file a petition for writ of habeas corpus or, in the alternative, failed to advise his client that he lacked a sufficient legal basis to file the petition and he failed to respond to numerous inquiries from the client. This matter is before the Attorney Discipline Board upon the filing of the Grievance Administrator's petition for review which seeks reversal of the hearing panel's order dismissing the complaint.

Based upon a review of the whole record, we conclude that the hearing panel's decision has adequate evidentiary support in the record. Specifically, we affirm the hearing panel's judgment that the respondent's acts or omissions did not constitute violations of the cited provisions of the Michigan Court Rules, Code of Professional Responsibility or Michigan Rules of Professional Conduct.

The respondent was first appointed to represent Terry Booth in a criminal appeal in 1976. Respondent was and continues to be an employee of the State Appellate Defenders Office (SADO) and is currently the chief deputy defender. His client, the complainant, had been convicted of a serious felony pursuant to a plea of guilty but mentally ill and had been sentenced to life in prison.

As the result of the respondent's efforts, the Michigan Court of Appeals remanded the case to the trial court in November 1978. The respondent pursued an appeal in the Michigan Supreme Court. An application for leave to appeal was granted by the Court in April 1980. In October 1982, the Supreme Court affirmed Mr. Booth's conviction and life sentence.

Although the formal complaint recites the respondent's representation of Mr. Booth from 1976 to 1982, the specific charges of professional misconduct arise from the respondent's agreement in September 1986 to file a petition for writ of habeas corpus on Booth's behalf.

Prior to that agreement, the respondent's duties as appellate counsel had ended. However, the respondent testified that inasmuch as this was the first appeal in Michigan involving a plea of guilty but mentally ill, the respondent was extremely interested in the issues and agreed to pursue the matter on Booth's behalf. (Tr. p. 10) In September 1986, the respondent wrote to Mr. Booth that "I have been reviewing the federal issues in your case to take into consideration recent developments in state and federal law. I am sorry for the delay this has caused, but I felt this had to be done if we are to have a chance at succeeding." In November 1986, the respondent advised his client, "I am still proceeding with your habeass. I will file it and let the chips fall where they may".

The record discloses that no petition for writ of habeass corpus was field at that time and the respondent concedes that he may not have had any direct communication with Mr. Booth from November 1986 until January 1989. on January 6, 1989, the respondent wrote to Booth and advised that he had set aside some personal time to work on the petition and would have it completed within a few months. He testified to the panel that between January 6, 1989 and November 1989, six drafts of the petition were prepared and a petition and brief were delivered to Booth when the respondent visited him in November 1989. In January 1990, Mr. Booth filed a writ for habeass corpus, in pro per. The respondent testified that the petition filed by Mr. Booth was a retyped copy of the material delivered to him by respondent in November 1989. (Tr. p. 80)

The complaint charged that the respondent violated his duties as an attorney in two respects: 1) By failing to file a petition for writ of habeas corpus or, in the alternative, failing to advise his client that he lacked a significant legal basis to file the petition; and, 2) His failure to communicate adequately with his client.

Our review of the hearing panel's decision that the respondent's acts or omissions did not rise to a level of professional misconduct is guided by the standard of review which directs that the panel's findings are to be reviewed for proper evidentiary support on the whole record. In re Freeman, 406 Mich 256; 277 NW2d 635 (1979); In re: Grimes, 414 Mich 483; 236 NW2d 380 (1982). At the same time, the Board possess a measure of discretion with regard to its ultimate decision. Grievance Administrator v August, 483 Mich 296; 304 NW2d (1991).

As to the charges based upon the repondent's failure to file the petition for writ of habeass corpus, the respondent's testimony regarding the research which he and his staff conducted and the professional judgments which he made regarding the viability of the claim constitute more than ample evidentiary support for the panel's conclusion that the nonfiling of the petition did not, in-and-of-itself, constitute professional misconduct in violation of the disciplinary rules or rules of professional conduct cited in the complaint.

The issue of the respondent's communication with his client presents a more difficult question. There is evidentiary support in the form of the respondent's testimony, for a finding that the communications between the respondent and his client, from September 1986 until early 1989 were sporodiatic, at best, but that the respondent did not fail to answer direct

inquiries from the client during that period. In 1989, Mr. Booth testified, he wrote as many as ten letters to the respondent without receiving a reply. Respondent admitted to the panel that he did not respond to each of Mr. Booth's letters, explaining, "I could have responded to his letter and addressed these issues seriatim, issues that I had already addressed, or I could have worked on his brief. My hope was that if I could get the brief and the petition done and submit that to him, that would answer his questions." (Tr. p. 27-28)

The Code of Professional Responsibility, which was in effect at the time the respondent was first appointed to represent Mr. Booth contained no specific provision regarding an attorney's duty to communicate with a client or to respond to the client's inquiries. However, with the adoption of the Michigan Rules of Professional Conduct by the Michigan Supreme Court, effective October 1, 1988, those duties were spelled out in MRPC Rule 1.4 which directs that:

Rule 1.4 Communication

(a) "A lawyer shall keep a client reasonably informed about the status of a matter and comply promptly with reasonable requests for information. A lawyer shall notify the client promptly of all settlement offers, mediation evaluations, and proposed plea bargains."

However, no violation of MRPC 1.4(a) was charged in this matter. The panel's opinion is affirmed.