

STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator
State of Michigan
Attorney Grievance Commission

Petitioner

v

Frank G. Proctor, P 19112,

Respondent

Case No. 91-94-GA

Decided: September 11, 1992

BOARD OPINION

The Grievance Administrator and the complainant Marie Daniels, have filed Petitions for Review seeking reversal of the hearing panel's decision to dismiss this formal complaint. Based upon a review of the whole record, the Attorney Discipline Board has determined that there was ample evidentiary support for the panel's decision. The Order of Dismissal must therefore be affirmed.

The formal complaint charged in Count One that the respondent was retained by Ms. Daniel in January 1990 to represent her in her purchase of real property but that the respondent violated his duties and responsibilities to her by failing to determine the proper balance owed on the existing land contract and by failing to keep Ms. Daniel informed concerning the status of the transaction.

Count Two charged that, simultaneous with his representation of Marie Daniel, the respondent represented the seller of the property, Judith Manz. The complaint charged that he failed to advise the seller and the purchaser of the implications of the common representation and that his continued representation of both parties was prejudicial to the purchaser, Ms. Daniel.

Count Three charged that the respondent made false statements in his answer to the request for investigation filed by Ms. Daniel by stating unequivocally that Ms. Daniel was not and had never been a client and that he had advised Ms. Daniel that he could not represent both parties in the transaction.

Throughout these proceedings, it has been the respondent's position that he was initially retained by the seller and that he made it clear to both parties that he could not represent both parties. Following the closing, it became clear to all parties that there was an error in the remaining balance on the land contract assigned to Ms. Daniel. The respondent acknowledges that a letter was sent from his office to the land contract vendor stating that "I represent Marie Daniels and Judith Manz with respect to the land contract between yourself and Judith Manz". This letter was sent approximately six months after the closing and was signed for the respondent by his secretary. The respondent maintained that this letter was neither read nor signed by him. (T-45-46)

At the hearing, the complainant testified as to her belief that the respondent had agreed to represent both parties in the real estate transaction and she denied that any statements were made by the respondent that he did not represent her or advising her of her right to consult another attorney. (T51-52)

This testimony by the complainant was not consistent with the testimony of the respondent that he was retained solely by the seller, Ms. Manz, and that he advised both parties at the closing that he represented Ms. Manz only. (T17-18). Ms. Manz testified to the panel that she retained the respondent's services prior to the closing and that the respondent advised Ms. Daniel at the closing that he was not representing the purchaser. (T119, 123)

The hearing panel also received testimony from the respondent's secretary regarding the client information sheet used in the respondent's office. She identified the client information sheet filled out by Ms. Manz and the office "file information sheet" identifying Ms. Manz as the client. (T134). She also noted the absence of any information on those documents identifying Ms. Daniel as a client of the office. (T134-135)

In its written report, the hearing panel stated that "the witnesses differed substantially in their testimony with respect to whether the respondent had ever agreed to a mutual representation of Ms. Daniel and Ms. Manz. The panel concluded that:

"After carefully reviewing all of the exhibits, hearing the testimony and later reviewing the total record, it is the conclusion of the hearing panel that the Grievance Administrator has not met its burden of proof with respect to Counts I through III of the formal complaint and that this formal complaint must be dismissed with prejudice".

In this review proceeding, the Board is charged with the responsibility of determining whether that judgement has proper evidentiary support on the whole record. In re Freedman 406 Mich 256; 277 NW2d 635 (1979); In re Grimes 414 Mich 483; 326 NW2d 380 (1982); Grievance Administrator v August 438 Mich

296; 475 NW2d, 256 (1991). In applying this standard, the Board has traditionally recognized that it is the hearing panel which receives evidence in the first instance and has the opportunity to judge credibility. Matter of David M. Walsh File No. 16-83 opinions of the Board page 333, 335 (1984). A hearing panel's findings of fact should be given deference whenever possible and the panel's findings should stand when they are supported by the whole record. Matter of Harry S. Sherman, DP 68/86 Board Opinion July 21, 1987.

As in any case in which a panel is required to make findings of fact based upon conflicting evidence, there may be evidence in the record which supports the position of the Grievance Administrator or the complainant. Nevertheless, it is not the Board's function to conduct a de novo review. We are satisfied that the testimony of the respondent, the respondent's secretary and Ms. Manz, together with the exhibits, constitutes proper evidentiary support for the hearing panel conclusions in this case.

We recognize that review of the hearing panel's dismissal of Count Three requires consideration of the panel's statement that:

"This exercise of poor judgement continued through his false and inaccurate statement to the Grievance Administrator that he had never represented Ms. Daniel, while failing to disclose or mention his letter of July 26, 1990, to Stanley Moore, in which he stated that he did represent Ms. Daniel and Ms. Manz"

We agree with the panel's assessment that the respondent's failure to clarify the apparent inconsistency between the contents of the July 26, 1990 letter and his statement to the Grievance Commission that he "never" represented Ms. Daniel was an exercise of poor judgement. Nevertheless, the panel's factual finding that the respondent made a false statement does not mandate reversal of the panel's decision to dismiss Count Three.

That Count charged specifically that the petitioner's statements in his answer to the request for investigation were false, were known by him to be false when they were made "and were material misrepresentations to the Attorney Grievance Commission to fraudulently conceal his misconduct and to impede its investigation".

Upon consideration of the whole record, there is ample evidentiary support for the panel's conclusion that, even if the petitioner's answer to the request for investigation was not accurate, it was not established that such statements were made "fraudulently", or with the intent "to conceal his misconduct and to impede the investigation".

John F. Burns, Miles A. Hurwitz and Theodore P. Zegouras.

CONCURRING IN PART AND DISSENTING IN PART

Elaine Fieldman

I would remand this case to the panel as to Counts I and II with instructions to submit a supplemental report. The report should clarify the basis upon which the panel reached its conclusions.

The pivotal question in this case is whether respondent acted as Marie Daniel's attorney in connection with a real estate transaction.

While the panel ultimately concluded that respondent did not represent Daniel, the panel stated that respondent's credibility was in doubt and Daniel's belief that respondent was her lawyer may have been reasonable:

While the Respondent appeared to be sincere in his belief that he did not represent Ms. Daniel at this real estate closing on January 12, 1990, and that he made it very clear to her that he could not represent her, the manner in which he handled that relationship, and his later dealings with Ms. Daniel and the Grievance Administrator raise some doubts about either his credibility or his good judgment.

* * *

The Hearing Panel believes that Respondent did exercise poor judgment and was very cavalier in his handling of this matter from the outset. The acceptance by Respondent of a direct fee payment from Ms. Daniel might very well have led her to believe that he was representing her, even though he felt that he made is clear that he could not represent her.

Panel Opinion at 5, 7. */

The panel ruled in favor of respondent because it could not "find that there was ever any agreement entered into between respondent and Ms. Daniel in which he agreed to represent her and Ms. Manz." However, it may not be necessary that there be an express agreement for the formation of and attorney/client relationship. There is authority for the proposition that a lawyer may be found to have represented a person because the lawyer's actions instilled reasonable reliance of representation in the mind of the "client." See ABA/BNA Lawyers' Manual on Professional Conduct Sec. 31:101 et seq. Indeed, the panel here found that Daniel's belief that respondent was representing her was reasonable. That may be enough.

*/ The Grievance Administrator suggested that the hearing panel report can be interpreted as the panel's attempt to admonish the respondent for professional misconduct. The tone and content of the panel's report supports this interpretation. The power to admonish is reserved exclusively for the Attorney Grievance Commission under MCR 9.106(6). A hearing panel which finds that a charge of misconduct has been established by a preponderance of the evidence must enter an order of discipline. MCR 9.115(J)(3).

The panel should reconsider its opinion and clarify how it resolved the credibility issue and answer the question of whether Daniel's reliance was sufficient to form an attorney/client relationship.

Linda S. Hotchkiss, M.D., joins in this dissent