STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,
State of Michigan
Attorney Grievance Commission,

Petitioner/Appellant,

v

Rhonda R. Russell, P 37762,

Respondent/Appellee.

91-202-GA; 91-235-FA

Decided: August 11, 1992

BOARD OPINION

The consolidated complaints in this case charged that the respondent neglected a legal matter entrusted to her and failed to communicate adequately with her client; failed to answer a Request for Investigation; and failed to file a timely answer to a formal complaint. Based upon the evidence presented, the hearing panel concluded that the charges of neglect and non-communication had not been established. The count which alleged failure to answer a Request for Investigation was dismissed on the grounds that the Request for Investigation was not actually delivered to her and the respondent did not have adequate notice. Finally, the panel concluded that a finding of professional misconduct for failure to file a timely answer to a formal complaint was not warranted where it was established that the respondent mailed her answer to the complaint thirteen days after she received it and within twenty-one days after the complaint was mailed to her.

The Grievance Administrator does not challenge the panel's dismissal of the count which charged neglect of a client matter. The Administrator seeks review in this case on the issues of the respondent's failure to answer a Request for Investigation and failure to file a timely answer to a formal complaint. We affirm the hearing panel's decision.

Formal complaint 91-202-GA, Count II, charged that the respondent failed to answer a Request for Investigation served upon her by regular mail on April 19, 1991 and served by certified mail on May 15, 1991. It is undisputed that both mailings were addressed to the respondent at the office address which she had registered with the State Bar of Michigan in accordance with Rule 2 of the Supreme Court Rules concerning the State Bar. Respondent Russell testified that she received neither mailing and had no notice that the Request for Investigation had been filed until she received a formal complaint on November 8, 1991.

In its report, the panel noted the respondent's testimony that she had experienced difficulty in obtaining her mail during the time in question, that the mailing address was shared by four different companies and that the entrance to her office was not actually on the same street as her mailing address. There is ample evidentiary support in the whole record to support the panel's conclusion that respondent Russell did not have actual notice of the Request for Investigation as alleged in Count II of Complaint 91-202-GA. In light of that evidentiary support, the panel's factual findings on this issue must be affirmed. Grievance Administrator v August, 438 Mich 296; 304 NW2d 256 (1991); In re Grimes, 414 Mich 483; 326 NW2d 380 (1982).

It is the Grievance Administrator's position, however, that non-delivery of the Request for Investigation does not constitute a defense and that discipline must be imposed whether or not Ms. Russell actually received the Request for Investigation. This position was explicitly argued to the hearing panel in closing arguments:

> "Administrator's Counsel: Exhibit 2 is the Request for Investigation that was served. And the fact that she doesn't get it is not material or relevant, because the rule says service is effective at the time of mailing and non-delivery doesn't affect the validity." (Tr. p. 116)

The Rule referred to by the Administrator is MCR 9.112(C)(1)(b) which states, in part,

> "Service [of the Request for Investigation) is effective at the time of mailing, and non-delivery does not affect the validity of service".

Adoption of the argument presented in this case would result in the imposition of professional discipline in every case involving a failure to file a timely answer to a Request for Investigation even if the respondent could establish conclusively that there was non-delivery. To cite extreme examples, discipline would be imposed even if it were established that the respondent's mailbox had been destroyed by vandals, that the post office had burned to the ground or that the mail carrier had thrown his deliveries in a landfill.

We recognize the constitutional validity of MCR 9.112(C)(1)(b) as a means of providing notice which is reasonably calculated, under all the circumstances, to apprise the subject attorney of the pendency of the investigation. Mullane v Central Hanover Bank & Trust Company, 339 U.S. 306, 94 L Ed 865, 70 S. Ct. 652 (1950). This is particularly true in light of the requirement of Rule 2 of the Supreme Court Rules regarding the State Bar of Michigan that every member of the State Bar shall notify the Bar of his or her correct address and "The name and address on file with the State

Bar of Michigan at the time shall control in any matter arising under these Rules involving the sufficiency of notice to a member . . .As a commentator has noted:

> "A respondent can hardly complain If his or her last known address is not his or her address, since the discrepancy would be caused by the respondent's own violation of the duty to comply with the Supreme Court Rules". Dubin and Schwartz, Michigan Rules of Professional Conduct and Discipline Procedure, ICLE, Ann Arbor, MI 1989.

Rather, our concern is with the lack of due process which would result in the adoption of a rule preventing the exercise of any discretion by a hearing panel where the panel concludes that the lack of notice to the respondent was not the result of any culpability on the part of the respondent. In such cases, we believe that non-delivery, through no fault of the respondent, may be material and relevant.

Having determined that there was proper evidentiary support for the panel's factual finding in this case, we affirm its decision to dismiss Count II of Complaint 91-202-GA.

II.

We have also considered the claim that the hearing panel erred by dismissing Complaint 91-235-FA. This complaint, filed November 22, 1991, charged that Formal Complaint 91-202-GA was served on the respondent by mail on October 31, 1991, that the respondent's answer to that complaint was not filed within twenty-one days of the date of service, in violation of MCR 9.115(D); and that this failure to file a timely answer constituted professional misconduct in violation of MCR 9.104(1,2,4,7) and the Michigan Rules of Professional Conduct, 8.1(b); 8.4(a,c).

The hearing panel found that Formal Complaint 91-202-GA was sent to the respondent by certified mail from Detroit on October 31, 1991. Respondent Russell received the complaint on November 8, 1991. The panel found that respondent Russell placed her answer to the complaint in the mail on November 21, 1991.

The panel's factual findings are unchallenged by either party. For purposes of our review, it is conceded that Ms. Russell's answer to the complaint was mailed thirteen days after she received the complaint and that it was mailed within twenty-one days after the complaint was mailed to her. It is also clear from the record that, although the members of the hearing panel received Ms. Russell's answer on Friday, November 22, 1991, the original answer mailed to the Attorney Discipline Board was not received and filed until Monday, November 25, 1991.

The Grievance Administrator argues correctly that the Grievance Administrator's voluntary withdrawal of the default entered on November 22, 1991 did not preclude a finding by the panel that the failure to file a timely answer constituted misconduct. Neither is such a finding mandated.

The record discloses that when Ms. Russell received the first formal complaint in November 1991, she immediately telephoned the Grievance Administrator's counsel whose name appeared on the complaint. It is not disputed that she stated in that call that she had not been aware of the Request for Investigation and that she explained that she had experienced difficulty in receiving her mail. The respondent advised counsel that she would need the Request for Inves tigation in order to respond to the allegations in the formal complaint.

Approximately one week later, on November 15, 1991, a copy of the Request for Investigation was sent to the respondent with a letter reminding her that she had twenty-one days, from October 31, 1991, to file an answer to the complaint. (Exh. #8) The respondent received that letter and a copy of the Request for Investigation, on Monday, November 18, 1991. (Tr. p. 26) She prepared an answer to the Request for Investigation and an answer to the complaint and mailed both documents on Thursday, November 21, 1991. The Grievance Administrator's default and supplemental complaint for failure to answer were filed on Friday, November 22, 1991, the same day the answer was received by the panel members. The original answer was apparently delivered to the Board on Saturday, November 23, 1991 and time-stamped on Monday morning, November 25, 1991.

Under these circumstances, the hearing panel declined to impose discipline for the respondent's failure to file a timely answer to a complaint. We do not believe that reversal of that decision is warranted.

John F. Burns, Elaine Fieldman, Linda S. Hotchkiss, M.D., Miles A. Hurwitz and Theodore P. Zegouras

Board Members George E. Bushnell, Jr. and C. Beth DunCombe did not participate in this decision.