

STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,
State of Michigan
Attorney Grievance Commission,

Petitioner/Appellant,

v

Sandra S. Schultz, P 30269,

Respondent/Appellee.

ADB 149-89

Decided: August 23, 1991

MAJORITY BOARD OPINION

John F. Burns, Remona A. Green, Hanley M. Gurwin,
Linda S. Hotchkiss, M.D., and Theodore P. Zegouras

The hearing panel in this case issued an Order of Reprimand following its determination that the respondent, Sandra S. Schultz, neglected a legal matter entrusted to her and failed to file a timely response to a Request for Investigation. The Grievance Administrator has filed a petition for review seeking increased discipline as well as a ruling from the Board that the panel erred in failing to sustain the allegations of misconduct charged under Canon 7 of the former Code of Professional Responsibility. The Board has conducted review proceedings under the provisions of MCR 9.118, including review of the whole record before the panel. The hearing panel's findings of misconduct are affirmed. However, the nature of the respondent's misconduct, coupled with the aggravating effect of her prior failure to file a timely answer to a Request for Investigation, warrant a modification of the discipline imposed. The discipline in this case is increased to a suspension of thirty days.

Counts I and II of the Grievance Administrator's complaint are based on matters arising from the respondent's retention by a client to further the prosecution of a civil action which had already been commenced in a Wisconsin court. Specifically, it is alleged that Ms. Schultz failed to take any action on her client's behalf from July 3, 1986 until January 6, 1988. On March 30, 1988, the case was dismissed by the presiding judge in Iron County, Wisconsin for lack of diligent prosecution.

In its findings of fact, the hearing panel reported that the Wisconsin court had previously issued an order in January 1986 which stated that the court would assign motion and trial dates. The panel found that the respondent was justified in her reliance upon that prior order. The panel ruled further, however, that the respondent's inaction for a period of approximately eighteen months constituted neglect within the meaning of Canon 6 of the Code of Professional Responsibility which was then effect, specifically DR 6-101(A).

The panel further reported that the charges of misconduct under the provisions of Canon 7 of the Code of Professional Responsibility, DR 7-101, had not been established. In considering the panel's findings, the Board is guided by the standard of review enunciated by the Supreme Court and those findings will be supported where -Upon the whole record, there is proper evidentiary support". In re DelRio, 407 Mich 336; 285 NW2d 277 (1977). Applying that standard, there is ample evidentiary support for the panel's finding in this case that the respondent's neglect of a legal matter did not violate the provisions of Canon 7, DR 7-101(A)(1-3).

That sub-rule directs that a lawyer shall not "intentionally" 1) Fail to seek the legal objectives of a client through reasonably available means permitted by law, 2) Fail to carry out a contract of employment entered into with a client for professional services, and 3) Prejudice or damage a client during the course of the professional relationship. It is argued that because respondent neglected her client's legal matter and thereby prejudiced her client's rights, the panel was obligated to find misconduct under DR 7-101(A)(1-3). While allegation of acts or omissions which may fall within the generic category of "neglect" are typically charged under the provisions of both Canon 6 and Canon 7 of the Code of Professional Responsibility if the alleged misconduct occurred prior to October 1, 1988, a finding of "neglect" within the meaning of DR 6-101(A)(3) does not necessarily establish misconduct under DR 7-101(A). To establish a violation under DR 7-101(A)(1, 2, or 3), it must be demonstrated that the proscribed acts were done intentionally. We agree with the panel's conclusion that the essential element of intent is without sufficient evidentiary support and that misconduct has not been established under DR 7-101(A)(1-3).

Although not addressed directly in the supporting brief, the Grievance Administrator's Petition for Review also requests a ruling that the hearing panel erred in its failure to sustain the charge of misconduct under Canon I of the former Code of Professional Responsibility, DR 1-102(A)(5). That rule directs that a lawyer shall not "Engage in conduct that is prejudicial to the administration of justice". It has not been shown that neglect of a legal matter constitutes, as a matter of law, conduct prejudicial to the administration of justice. The Board is not persuaded that the hearing panel's decision on this issue should be reversed.

Finally, the Grievance Administrator seeks review of the discipline imposed. The panel's report lists the mitigating factors which it considered in arriving at a decision to impose a reprimand. While the Board is prepared to give deference to the panel's consideration of those factors, we believe that the aggravating effect of this respondent's prior failure to answer a Request for Investigation warrants modification of **that** discipline.

We are particularly troubled by the timing of the events which have brought Ms. Schultz to the Board's attention for the second time. In an opinion issued May 7, 1990, Matter of Sandra S. Schultz, ADB 96-89, the Board affirmed the decision of another hearing panel to impose a reprimand for respondent's failure to file a timely answer to a Request for Investigation. In that opinion, we noted that Ms. Schultz admitted that a Request for Investigation was served in accordance with MCR 9.112(C)(1)(b) on March 20, 1989 and that a notice was sent to her by the Grievance Administrator on May 13, 1989 advising that failure to file answer would subject her to formal charges of formal misconduct. On July 5, 1989, the Grievance Administrator's formal complaint was filed with the Discipline Board and was subsequently served on the respondent.

In the case now before the Board, a Request for Investigation filed by complainant Frank Bruni was served on Ms. Schultz on May 15, 1989. On June 2, 1989, she requested and received an extension of time to file an answer to June 16, 1989. On June 20, 1989, a final notice was mailed by the Grievance Administrator. On July 26, 1989, subsequent to the filing of the earlier formal complaint, respondent Schultz again requested an extension of time to answer. When the instant complaint was filed September 26, 1989, no answer had been received.

While the reprimand imposed by the Board in May 1990 was based solely upon the respondent's failure to file a timely answer to a Request for Investigation, this case involves not only a second failure to answer but neglect of a client's case for a substantial period of time. These factors preclude our affirmation of a second reprimand. Discipline in this case is increased to a suspension of thirty days.

DISSENTING OPINION

George E. Bushnell, Jr.

While I join with the majority in its decision to affirm the hearing panel's findings and conclusions on the charges of misconduct, I believe that greater deference should be afforded the panel's decision on discipline. The hearing panel in this case is to be commended for a thoughtful analysis of all the issues presented, including discipline. That decision has not been shown to be clearly erroneous and should be affirmed.

Elaine Fieldman did not participate in this matter