

STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,
State of Michigan
Attorney Grievance Commission,

Petitioner/Appellant,

v

Seymour Floyd, P 28796,
Respondent/Appellee.

90-129-GA

Decided: May 2, 1991

BOARD OPINION

The Grievance Administrator has appealed a hearing panel decision to impose a reprimand with restitution and a condition requiring submission of a doctor's report, based upon the respondent's failure to return the unused portion of an attorney fee and his failure to answer a Request for Investigation. The Attorney Discipline Board has considered the Petition for Review filed by the Grievance Administrator seeking modification of the discipline imposed by the panel. Based upon its review of the whole record, the Board has concluded that the hearing panel's order of discipline should be modified by increasing discipline to a suspension of thirty days, with the conditions described herein.

There is little or no dispute regarding the factual basis for the panel's findings. In his answer to the formal complaint, the respondent admitted the allegations in Count I that he received a retainer fee from Ms. Dorothy Norton in the amount of \$2750 to pursue an appeal on behalf of Morton's brother and that he subsequently agreed to reimburse the sum of \$2500 to her. Specifically, the respondent's answer, dated August 22, 1990, contains the statement that "respondent still agrees to return the \$2500 and shall do so forthwith".

At the hearing, evidence was introduced to show that the respondent issued a check to Ms. Morton on June 30, 1989 in the amount of \$2500 but that it was dishonored by his bank and returned marked "NSF". As of the date of the hearing before the panel, November 20, 1990, no further effort had been made to return the unused fees although Mr. Floyd stated in Ms. Morton's presence at the hearing that he intended to make reimbursement. The panel concluded that the respondent's failure to return the unused portion of the retainer fee constituted professional misconduct in violation of MCR 9.104(1-4) and the Michigan Rules of Professional Conduct, Rule 8-4(a-c) and Rule 1-6(b).

The complaint further charged that the respondent failed to answer a Request for Investigation which was mailed on April 19, 1990. The respondent acknowledged receiving the Request for Investigation and testified that he prepared an answer dated May 1, 1990. An original letter bearing that date and signed by Mr. Floyd was offered into evidence. He explained, however, that the answer was inadvertently not mailed. The respondent acknowledged receiving a second notice from the Attorney Grievance Commission dated May 18, 1990 informing him that his answer had not been received. He admitted during the hearing that preparation of the answer, without filing it, did not satisfy the requirements of MCR 9.113(A). The panel found that failure to answer the Request for Investigation was a violation of MCR 9.104(1-4); MCR 9.103(C); MCR 9.113(B)(2) and Rule 8.4(a,c) of the Michigan Rules of Professional Conduct.

Based upon the respondent's testimony in mitigation, the panel concluded in its report that the respondent "was and is severely depressed" as a result of the breakdown of his relationship with his fiancée'. The panel also considered his testimony regarding a series of financial setbacks. These factors were noted by the panel, together with his remorse, his candor in his testimony to the panel and the absence of prior misconduct, in its decision to impose a reprimand.

The Attorney Discipline Board has consistently emphasized the duty of an attorney to answer Requests for Investigation see, for example, Schwartz v Kennedy, DP 48/80, Brd. Opn. p. 132 (1981); Schwartz v Ruebelman, DP 5/81 Brd. p. 150 (1981); In Re: Smith, 35229-A Brd. Opn. 21 (1979). More recently, in Matter of David A. Glenn, DP 91/86 Brd. Opn. (February 23, 1987) the Board served notice that "the lawyer who ignores the duty imposed by Court Rule to answer Requests for Investigation and formal complaints does so at his or her peril and that, absent exceptional circumstances, that attorney may expect a discipline greater than a reprimand". The record in this case is devoid of compelling mitigating circumstances related directly to the failure to file an answer to the Request for Investigation. The respondent's poor financial situation would not have impeded his ability to answer the Request for Investigation. The "depression" recognized by the panel could have been cited in connection with the failure to answer except that respondent produced the letter which, he testified, was prepared at his direction and signed.

The Board is also troubled by the respondent's continuing failure to make even a token gesture toward the restitution to Ms. Morton since delivering an NSF check to her in the amount of \$2500 in June 1989. However, the hearing panel's order specifically provides for the institution of show cause proceedings in the event of noncompliance with the restitution provision and the Board's decision to increase discipline to a suspension of thirty days is based solely upon the failure to answer the Request for Investigation.

Although the respondent offered no medical evidence to the panel, his testimony with regard to the psychological impact of his breakup with

his fiancée' led the panel to the conclusion that he was "severely depressed". The panel's concern in that regard was reflected in the provision in their order requiring him to submit to a medical examination within thirty days of the effective date of the order [January 18, 1991] to determine whether respondent requires additional treatment for any physical or emotional condition".

At the hearing conducted before the Attorney Discipline Board in accordance with MCR 9.118 on March 19, 1991, the respondent had not complied with the panel's order to submit written proof of that examination. However, his counsel represented to the Board that the respondent has continued to treat with a psychiatrist and that a report could be submitted. The Board has considered the record below in light of the representations and has concluded that the following modification to the hearing panel's order are appropriate:

- 1) The hearing panel's Order of Restitution with interest is affirmed. In addition to full restitution of \$2750 plus interest assessed in the panel's order in the amount of \$295, further interest shall be computed at the statutory rate applicable to a civil judgment in a district court computed from January 18, 1991 to the date of payment.

- 2) Respondent shall submit to a psychiatric evaluation by Dr. Ganish within sixty days of the date of this order. Copies of the report shall be provided to the Attorney Discipline Board and the Grievance Administrator. If respondent has discontinued treatment with Dr. Ganish, respondent shall provide notice in writing to the Grievance Administrator and the Discipline Board, within fourteen days, of the name and address of the psychiatrist.

- 3) Respondent shall, for a period of six months following the effective date of this order, continue treatment with Dr. Ganish and comply with his recommendations.

- 4) Respondent shall file with the Attorney Discipline Board and the Grievance Administrator, no less than six months and no more than eight months from the date of this order, a written report from Dr. Ganish summarizing respondent's progress.

John F. Burns, George E. Bushnell, Jr., Elaine Fieldman, and Linda S. Hotchkiss, M.D.

Remona A. Green, Member was not present and did not participate in this decision

DISSENTING OPINION

Hanley M. Gurwin

I concur in the conditions imposed by the majority but would increase discipline in this case to a suspension of sixty days based upon the respondent's failure to return the unearned legal fee for a protracted period, coupled with the separate and unrelated misconduct arising from his failure to answer the Request for Investigation.

DISSENTING OPINION

Theodore P. Zegouras

I believe that it is generally advisable to defer to the judgment of the panels, especially when the panel members have had a first-hand opportunity to observe the respondent /attorney and to weigh his testimony. I would affirm the hearing panel's decision in this case.