

STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,
State of Michigan

Attorney Grievance Commission,

Petitioner/Appellant,

v

Michael E. Mullins, P 33582,

Respondent/Appellee.

90-14-GA; 90-36-FA

Decided: April 30, 1991

SEPARATE OPINIONS TO AFFIRM AND TO REVERSE
HEARING PANEL ORDER OF DISMISSAL

(Hearing Panel Order of Dismissal
Affirmed for Lack of Majority Opinion)

OPINION TO AFFIRM (BUSHNELL, FIELDMAN and ZEGOURAS)

The respondent, Michael E. Mullins, was charged in a single-count complaint with failing to file an answer to a Request for Investigation served upon him by mail in accordance with MCR 9.112(C)(1)(b). The Grievance Administrator has filed a Petition for Review seeking reversal of the hearing panel's decision to dismiss that complaint. We agree with the hearing panel's ruling and would affirm the dismissal on the grounds that MCR 9.112(C)(1)(b) explicitly directs that no formal complaint based upon a failure to answer a Request for Investigation may be filed with the Board unless the Administrator has served the Request for Investigation by registered or certified mail, return receipt requested. The Grievance Administrator's failure to satisfy this requirement constituted a fatal deficiency which properly subjected the formal complaint to an order of dismissal.

In his answer to the formal complaint and in his testimony to the hearing panel, respondent has, at all times, admitted that he received a Request for Investigation sent to him by the Grievance Administrator by regular mail on July 13, 1989. The respondent has admitted that he failed to answer that Request for Investigation. He denies, however, the charge in the complaint that he received a second notice mailed by the Grievance Administrator on August 9, 1989 by certified mail, return receipt requested, advising him that failure to answer by August 19, 1989 would subject him to formal charges of professional misconduct.

There is nothing unclear or unambiguous about the last sentence of MCR 9.112(C)(1)(b). If a respondent has not filed an answer to a Request for Investigation, "no formal complaint shall be filed with the Board unless the Administrator has served the Request for Investigation by registered or certified mail, return receipt requested". (emphasis added) This requirement constitutes nothing less than a Jurisdictional requirement which should not be treated lightly by the Board or the Grievance Administrator.

Upon receipt of the respondent's answer to the complaint containing his denial that the Request for Investigation had been mailed by registered or certified mail, the Grievance Administrator was placed on notice that this jurisdictional requirement would have to be established by competent evidence. Notwithstanding counsel's unsworn representation to the panel that a final notice was sent by the Grievance Administrator's staff by certified mail on August 9, 1989, no documentary evidence or testimony by an employee of the Attorney Grievance Commission was offered in support of this assertion.

While we agree with the result reached by the hearing panel, we wish to avoid confusion in the future by noting that we do not endorse the view expressed by the panel's vice-chairperson at the conclusion of the hearing that the panel's interpretation of "service" and "return receipt requested" requires a showing of actual receipt as demonstrated by the signed receipt returned to the Grievance Commission.

Unlike the general rule governing service of process by mail, MCR 2.105(A)(2), which requires acknowledgment of receipt by the defendant and attachment of the return receipt to the proof of service, the rule governing service of a Request for Investigation in a disciplinary proceeding directs that "service is effective at the time of mailing, and nondelivery does not affect the validity of the service". [MCR 9.112(C)(1)(b)] While production of the return receipt signed by the addressee would be necessary to prove actual receipt, it is not necessary in order to prove that the item was mailed. In the case of certified mail, proof of mailing is evidenced by the receipt which is retained by the sender. Presumably, this receipt of mailing was retained by an employee of the Grievance Commission and could have been offered into evidence.

As the Grievance Administrator has correctly pointed out, the panel's dicta that proof of service by mailing requires production of the return receipt signed by the respondent would allow a respondent to avoid disciplinary proceedings by simply refusing to claim his or her certified mail. It is clear that MCR 9.112(C)(1)(b) requires only that the Grievance Administrator be prepared to prove that the Request for Investigation was sent by certified mail, not that it was actually received. This was not done.

George E. Bushnell, Jr., Elaine Fieldman and Theodore P. Zegouras

OPINION TO REVERSE (GREEN, GURWIN and HOTCHKISS)

The Grievance Administrator has appealed the decision of a hearing panel to dismiss disciplinary proceedings filed against the respondent for his failure to answer a Request for Investigation, notwithstanding the respondent's acknowledgment that he received the Request for Investigation and his frank admission that he failed to answer it. We would reverse the hearing panel's decision and impose discipline for the respondent's admitted misconduct.

The formal complaint filed by the Grievance Administrator on January 29, 1990 charged that a Request for Investigation was served upon Mr. Mullins on July 13, 1989 pursuant to MCR 9.112(C)(1)(b) and that he failed to answer the Request for Investigation within twenty-one days as required by MCR 9.113(A). The complaint further alleged that, following his failure to answer, a final notice was served on the respondent, by certified mail, return receipt requested, advising him that failure to answer by August 19, 1989 would subject him to formal charges of professional misconduct.

In his answer to the formal complaint, the respondent admitted that the Request for Investigation was served and admitted that he failed to answer it. He denied, however, the paragraph alleging service of a final notice by certified mail.

At the hearing before the panel, respondent Mullins again acknowledged that he failed to answer the Request for Investigation. Nevertheless, the hearing panel questioned both parties on the applicability of that portion of MCR 9.112(C)(1)(b) which requires that if an attorney fails to answer a Request for Investigation, "no formal complaint shall be filed with the Board unless the Administrator has served the Request for Investigation by registered or certified mail, return receipt requested."

According to the record, the Grievance Administrator's counsel referred to a copy of the final notice allegedly sent to Mr. Mullins by certified mail on August 9, 1989. Counsel stated to the panel that the Grievance Commission did not receive a return receipt for registered mailing. No further offer of proof was made and the Administrator's counsel reasserted her position that the respondent's admission that he received the Request for Investigation was conclusive on that issue.

The hearing panel unanimously ruled that the formal complaint in this case was "defective" because the Grievance Administrator did not serve a copy of the Request for Investigation on the respondent by regular and certified mail. Three members of the Attorney Discipline Board have filed a separate opinion agreeing that MCR 9.112(C)(1)(b) sets forth certain jurisdictional requirements which must be strictly adhered to. In their view, the respondent's admitted misconduct in failing to answer the Request for Investigation must be overlooked if the Grievance Administrator fails to prove that a follow-up copy was sent by certified mail. We do not agree and believe that the conclusion reached by the hearing panel was erroneous.

According to the panel's report:

"An attempt was made to serve the respondent with the Request for Investigation by certified mail. However, the Grievance Administrator's counsel indicated that the certified mail was returned undelivered . . . Rather than making an additional attempt to serve respondent with the Request for Investigation by certified mail, the Grievance Administrator's counsel filed the formal complaint".
(Report of Tri-County Hearing Panel #29, page 2)

If it was the finding of the panel that the Grievance Administrator did, in fact, serve a copy of the Request for Investigation by certified mail, then the finding of noncompliance with the requirements of MCR 9.112(C)(1)(b) was in error. Unlike the rule which applies in a general civil case, [MCR 2.105(A)(2)], service in a disciplinary proceeding does not require production of a copy of the return receipt. Instead, both MCR 9.112(C)(1)(b) and MCR 9.115(C) explicitly direct that service is effective at the time of mailing and "nondelivery does not affect the validity of the service".

Nevertheless, we will accept for purposes of this review that the Grievance Administrator did not offer competent evidence to the panel to

establish compliance with that requirement. (Presumably, a foundation could have been laid for the introduction of the receipt for certified mailing which is maintained in the possession of the sender.)

We still do not agree that failure to "prove" the certified mailing constituted a jurisdictional defect warranting dismissal. MCR 9.102 directs that sub-chapter 9.100 of the Michigan Court Rules is to be liberally construed for the protection of the public, the courts and the legal profession. MCR 9.107(A) pointedly directs that "an investigation or proceeding may not be held invalid because of a nonprejudicial irregularity or an error not resulting in a miscarriage of justice". The facts in this case are clear. Respondent Mullins has admitted that he actually received the Request for Investigation mailed to him by regular mail and he admits that he failed to answer it. Based upon those admissions, the record is clear that grounds for professional discipline have been established in accordance with MCR 9.104(7).

We fail to perceive how a finding of misconduct in this case could be described as a miscarriage of justice. The requirement that a Request for Investigation be served by certified mail before a formal complaint is filed was clearly intended for the protection of the respondent. In this case, there is simply no question that the respondent received the Request for Investigation the first time it was sent. If there was any irregularity in the manner of service, it was nonprejudicial and the panel's decision should be set aside.

Remona A. Green, Hanley M. Gurwin and Linda S. Hotchkiss, M.D.