

Grievance Administrator,
Petitioner/Appellee,
v
Kenneth E. Scott, P-32833
Respondent/Appellant.

File No. DP 189/86

Decided: February 22, 1989

BOARD OPINION

The hearing panel issued an order suspending the respondent's license to practice law for a period of thirty days as a result of a finding that the respondent failed to file an appeal in a timely manner. The Attorney Discipline Board has considered the petition for review filed by the respondent which claims that the hearing panel erroneously imposed discipline for misconduct which was not properly charged in the formal complaint. We agree. The hearing panel's order is reversed and the complaint is dismissed.

The Grievance Administrator filed a nine-count complaint. Two counts were voluntarily withdrawn by the Administrator and the hearing panel found that six other counts were not supported by the evidence. The dismissal of those counts has not been appealed.

The remaining Count IV charged that respondent Scott had a duty "to refrain from abusing the process of the federal courts" an in violation of that duty he 1) commenced a civil case even though he was advised that the statute of limitations barred the claim; 2) named as defendants persons he knew or should have known were not proper parties; and 3) "upon dismissal of said cause of action filed a frivolous appeal with the Court of Appeals which he then failed, neglected or refused to pursue." The conduct described in that count was alleged to be in violation of MCR 9.104(1)-(4) and Canons 1 and 7 of the Code of Professional Responsibility, DR 1-102(A)(4)-(6); DR 7-102(A)(1),(2)and(8). The hearing panel specifically rejected those paragraphs which allege that the respondent improperly filed the suit and named certain defendants.

The only allegation of misconduct in the complaint which was sustained by the panel was Count IV, Paragraph C-3 regarding the respondent's filing of a "frivolous appeal" which he then neglected. In its report, the hearing panel found that Mr. Scott's failure to timely pursue the Campbell appeal constituted a violation of Canon 6 of the Code, DR 6-101(A)(3). As the respondent points out, he was not charged with a violation of that Canon in the complaint.

An attorney may only be found guilty of misconduct as charged in the complaint. In re Ruffalo, 390 US 544; 88 S Ct 1222; 20 L Ed 2d 117 (1968). Since that decision by the United States Supreme Court in an attorney discipline case, the Michigan Supreme Court

has similarly directed that an attorney must be properly notified of the charges which he or she is required to defend.

It is a fundamental rule of due process that a person must have notice of the charges against him. Particularly is this true in a proceeding where a person is being challenged as to his right to continue to pursue his professional life. This notice is provided by the filing of the complaint . . . In this case, the respondent did not receive the notice that due process requires. The failure on the part of the State Bar to provide such notice violated respondent's constitutional rights and requires a reversal of his censure. In re Freed, 388 Mich 711 (1972). See also State Bar v Jackson, 391 Mich 147 (1973).

A fair reading of Count IV does not, in our opinion, reasonably inform the reader that the gravamen of the misconduct charged involves the neglect of an appeal. The duty alleged in Paragraph B of that count is the duty "to refrain from abusing the process of the federal courts." Paragraphs C 1-3 are all alleged to be violations of that duty and involve charges that the respondent filed frivolous or unwarranted claims. The Code provisions likewise only deal with the charges of filing a frivolous claim. If Count IV of the complaint was intended to charge misconduct as the result of neglect or failure to take timely action, it could have included charges under Canon 6, DR 6-101(A)(3) (neglect of a legal matter) or Canon 7, DR 7-101(A)(1) (failure to seek a client's lawful objective); DR 7-101(A)(2) (failure to carry out a contract of employment); or DR 7-101(A)(3) (prejudice or damage to a client).

The hearing panel erred in finding the respondent guilty of misconduct which was not charged in the complaint. The finding of misconduct was therefore constitutionally defective under the decisions cited above.

Martin M. Doctoroff, Remona A. Green, Hanley M. Gurwin, Robert S. Harrison, Linda S. Hotchkiss, M.D., Patrick J. Keating and Theodore P. Zegouras.