Grievance Administrator,
Petitioner/Appellee,
v
Richard A. Eagal, P-33727,
Respondent/Appellant.

ADB 163-87

Decided: March 13, 1989

BOARD OPINION

The hearing panel found that the respondent's failure to take action to prevent the dismissal of his client's case for no progress constituted a violation of Canon 6 of the Code of Professional Responsibility. The panel further found that the respondent advised his client that the case was still pending when it had, in fact, been dismissed. An order of reprimand was issued by the panel. The Attorney Discipline Board has considered the Petition for Review filed by the respondent seeking dismissal of the complaint on the grounds that there was insufficient evidentiary support for the hearing panel's conclusions. The Board is persuaded that the Order of Reprimand should be vacated and the complaint dismissed.

Certain facts in this case are not disputed. Respondent, Richard Eagal, was retained in August 1985 by Mr. and Mrs. Harold Corder to file a complaint against an automobile dealer as the result of their purchase of a defective automobile. The respondent filed suit in the First District Court in Monroe in December 1985 and an answer was filed in January 1986. In September 1986, the case was dismissed for no progress.

The complaint filed by the Grievance Administrator charged in the first count that the dismissal for no progress was a violation of the respondent's duty to further his clients' lawful objectives and to avoid prejudicing or damaging his clients. That count specifically charged violations of Canons 6 and 7 of the Code of Professional Responsibility, DR 6-101(A)(3) and DR 7-101(A)(1)-(3).

Count II charged that respondent advised his clients in November 1986 (two months after the dismissal for no progress) that there was to be a preliminary hearing in November. In January 1987, the respondent advised his clients that he expected the case to be scheduled for trial in several months and that he had received a settlement offer. In April 1987, the respondent was allegedly advised that the case would probably be tried in May or June. All of these statements were alleged to be false.

A third count charged that the respondent failed to file an accurate or timely answer to the Request for Investigation. That count was dismissed by the panel and the dismissal is not appealed.

The respondent testified to the panel that he does not regularly practice in Monroe District Court and that there are no officially adopted local rules in that Court requiring the filing of a pre-trial praecipe. He testified that he did not receive a notice from the Court regarding the impending dismissal and when he talked to his clients about the probability of a trial assignment, he believed in good faith that the case was still pending.

It appears that the dismissal of the Corders' complaint was the result of a failure to file an at issue praecipe. The respondent's testimony that he had no knowledge of that requirement is unrebutted. The clerk of that court testified as to the procedure which she personally followed in sending out the notices to attorneys that their cases would be dismissed for no progress and she testified that the notice to Mr. Eagal was not returned. Both Mr. and Mrs. Corder testified as to their various telephone conversations with the respondent and his messages to them regarding impending settlement conferences or court dates.

The hearing panel filed a report in accordance with MCR 9.115(J)(1) containing its conclusion that the evidence submitted as to Count I established that the respondent failed to represent his clients competently and that his conduct constituted a violation of Canon 6 "and the disciplinary rules thereunder." Respondent further argues that there is no general court rule requiring the filing of a praecipe in order to move a civil case along in the district court and that the proofs were insufficient to establish that he had actual notice of that local custom or of the impending dismissal. It is the position of the Grievance Administrator that the evidence supports an assumption that respondent did receive a no progress notice from the court and that, in any event, he had a duty to find out what the status of the case was.

The hearing panel's findings of fact should be given deference whenever possible. Matter of David N. Walsh, DP 16/83, August 16, 1987 (Brd. Opn. p. 333). Reviewing the panel's report in this matter, we note that a factual finding was made that a notice of no progress was mailed by the District Court clerk to the respondent on August 26, 1986 but there is no specific finding that he received it. We are struck, however, by the panel's conclusions in other parts of its report that the respondent did not have actual knowledge that the cause had been dismissed for lack of progress and that "there was no intentional wrongdoing." Our attempts to reconcile those findings with the panel's conclusion that misconduct was limited to a neglect of a legal matter in violation of DR 6-101(A)(3), leads us to the belief that the respondent's failure to ascertain the status of the case did not rise to the level of misconduct warranting discipline.

With regard to Count II of the complaint, the panel found that the respondent made statements to his client regarding the likelihood of a trial date when, in fact, that case had been dismissed for no progress. As noted above, however, the panel also

made a factual finding in connection with its dismissal of Count III that "respondent did not have actual knowledge that the cause had been dismissed for lack of progress."

The respondent argues persuasively that discipline should not be imposed where there was no intentional misrepresentation. We again consider the panel's statement in the discipline report that "respondent's misconduct was based on ignorance and there was no intentional wrongdoing." (emphasis added) Under the circumstances, we cannot affirm the hearing panel's findings that the respondent's statements to his clients, made with ignorance of the status of the case but without dishonesty, constituted violations of DR 1-102(A)(4) (conduct involving dishonesty or misrepresentations); DR 1-102(A)(5) (conduct prejudicial to the administration of justice); or DR 1-102(A)(6) (conduct adversely reflecting on his fitness to practice law).

In making this decision, we are aware that there are certain factual inconsistencies which could be drawn from the testimony of the respondent and the testimony of his clients. Had the panel found that the respondent knew of the dismissal of the case or otherwise made misleading statements to the clients regarding an alleged settlement conference, we might have been inclined to afford deference to those findings in accordance with the standard of review cited earlier. Our decision is based upon our inability to reconcile the factual findings made by the panel with the conclusions as to the nature of misconduct for which discipline was imposed. We therefore vacate the order of reprimand and dismiss the complaint.

All concur.