GRIEVANCE ADMINISTRATOR,
Petitioner/Appellee,
v
KENNETH KARASICK, P-26238
Respondent/Appellant.

File No. DP 162/85

Argued: May 20, 1987
Decided: July 21, 1987

OPINION OF THE BOARD

Upon consideration of the Petitions for Review filed by the Respondent and the Grievance Administrator, the Attorney Discipline Board affirms the Order of Reprimand issued by the Hearing Panel in this case for the reasons that the Panel's findings and conclusions are supported by the evidence contained in the whole record and that the discipline imposed is consistent with the primary purposes of these disciplinary proceedings.

In our review of the findings of a Panel we must determine whether there is proper evidentiary support in the whole record for the Panel's decision, Grievance Administrator v Crane 400 Mich 484 (1977); In Re DelRio 407 Mich 336 (1979). A fair reading of the evidence presented to the Panel in this case supports its findings that Respondent was retained in March 1984 by Donna Ferguson to represent her son who had been convicted of driving in violation of a driver's license restriction. Respondent agreed that he would "look into the matter". It was agreed that the primary legal objective of Bradford Ferguson was to avoid a jail term. It was further understood that the Respondent would require a payment of additional attorney fees if he was required to appear personally in the case in Iosco County. By April 5, 1984, Respondent concluded that he could not assist his client by arranging for a work release program nor was it likely that he could prevent imposition of a thirty-day jail term. Although Mr. Ferguson's sentencing was scheduled for April 10, 1984, Respondent did not communicate his conclusions to Donna Ferguson until the evening of April 9th. Al though his written appearance on behalf of Bradford Ferguson had been filed in the Iosco County District Court, Respondent did not appear in that Court at the sentencing.

We agree with the Panel's conclusion the Respondent's agreement to "look into" this matter included a duty to communicate the results of his investigation and to advise his client as to a future course of action. In this case, Respondent's belated communication with Donna Ferguson, on the eve of her son's sentencing, did not provide her or her son with an adequate opportunity to seek alternative legal representation or advice. Respondent's conduct violated the provisions of MCR 9.104(1-4) and Canon 6 & 7 of the Code of Professional Responsibility DR 6-101(3) and DR 7-101(A)(2).

We next consider whether the Reprimand imposed by the Hearing Panel was appropriate in this case. In its Report, the Hearing Panel cited the mitigating effect of Respondent's performance of legal services and his good faith effort to achieve the desired result of avoiding a jail term for Mr.

Ferguson; Respondent's refund of fees to his client; and the lack of evidence that earlier communication by the Respondent could have prevented the jail term which was, in fact, imposed. Although, as a general rule, the Board would assign relatively little weight to the lack of harm to a client as a mitigating factor, the Board does recognize that the Record in this case contains mitigation which, in our view, justifies the Panel's conclusion.

The Grievance Administrator, however, places special emphasis upon Respondent's prior record of discipline as an aggravating factor warranting an increase in the discipline imposed. Respondent Karasick was the subject of a ninety (90) day suspension effective September 16, 1981. The Record in this case does not disclose the nature of professional misconduct which warranted that discipline.

In oral arguments to this Board, Counsel stated the inflexible position of the Administrator and the Attorney Grievance Commission that when an attorney has been the subject of prior discipline, no matter how remote in time or circumstance, the attorney should be subject to the same or higher level of discipline than that which was previously imposed. Applying that rule to this case, it is urged that Respondent's license be suspended for a period of no less than ninety (90) days. The Board's attention was also called to the rule change proposed to our Supreme Court and endorsed by the Attorney Grievance Commission which would have set mandatory levels of discipline for subsequent offenses, with a second finding of misconduct automatically resulting in a minimum suspension of 180 days.

Our Court has not adopted a rule requiring the automatic imposition of a minimum level of discipline based upon prior misconduct. We take this opportunity to expressly state our opposition to such a rule. While the Board has recognized prior misconduct as an aggravating factor in prior cases and will undoubtedly continue to do so in the future, we recognize that the Board and its Hearing Panels should have some discretion to impose an appropriate level of discipline in cases where the prior misconduct is not reasonably related to the instant offense. As we noted In the Matter of James Hovey, Case No. 36409-A, August 7, 1980, (Brd. Opn, p. 92) in a case involving prior incidents of misconduct which occurred while the Respondent was an active alcoholic and which arose out of events then more than a decade old, "Although Respondent has been disciplined in the past, former misconduct is never a basis for exact formulation of discipline in the context of a subsequent and completely separate factual discipline."

The formulation of discipline according to an automatic schedule could, in some cases, result in discipline which is unduly harsh under the circumstances. We believe that following such a rule in this case would have such an effect. We affirm the Hearing Panel Order of Reprimand.

Concurring: Martin M. Doctoroff, Robert S. Harrison, Remona A. Green, Hanley M. Gurwin, Patrick J. Keating.