GRIEVANCE ADMINISTRATOR,
Petitioner/Appellee,
v
HARRY S. SHERWIN, P-20365,
Respondent/Appellant.

File No. DP 68/86

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

OPINION OF THE BOARD

Following its consideration of the Petition for Review filed by the Respondent, the briefs and arguments submitted by counsel, and a review of the proceedings below, the Attorney Discipline Board concludes that the findings and conclusions of the Hearing Panel are amply supported. The Board is persuaded, however, that the suspension of 180 days imposed by the Panel exceeds the level of discipline necessary to protect the interests of the public, the courts, and the legal profession. Specifically, the Board is unable to conclude that Respondent's professional misconduct in this case warrants additional scrutiny by another panel as part of the reinstatement process. Therefore, the Order of Discipline is modified by reducing the discipline to a suspension of 119 days.

The Complaint which was filed in November 1986 charged that the Respondent was retained by Richard Hamacher in July 1985 to represent him in the appeal of a criminal conviction. At that time, Hamacher's court appointed appellate attorney had already filed a short brief. The Complaint filed by the Grievance Administrator charged that Respondent represented to his client that a supplemental brief should be filed, and he promised to file such a brief along with a Motion for Bond Pending Appeal. It was charged that Respondent did not file a stipulation for substitution of attorneys until October 1985 and that he filed no further pleadings on his client's behalf.

In his answer, the Respondent denied that he promised to file a supplemental brief or Motion for Bond but stated that he had charged a $2500.00 retainer fee to render a "second opinion" on the merits of the brief already filed. At the commencement of the proceedings, the parties stipulated to the panel that a total of $1700.00 had actually been paid to the Respondent, that he had been discharged by Mr. Hamacher as counsel, and that the fees in question had been refunded to the client after the filing of the Formal Complaint.

Based upon its assessment of the witnesses and the exhibits, the Panel concluded that Respondent did agree to take the case with a minimum of $1000.00 to be paid immediately and the remaining $1500.00 to be paid at the rate of $100.00 per month. They found that Respondent promised the Complainant that he would file a supplemental brief and a Motion for Bond Pending Appeal and the Panel noted testimony before them that the Respondent told Mr. Hamacher in July 1985 that he would "be home before summer was over." The Panel concluded that the Complainant had a right to rely on the promises made by the Respondent.

The Supreme Court has stated the standard of review in these cases and the Board must determine whether the Hearing Panel's findings have evidentiary support in the whole record, Grievance Administrator v Crane, 400 Mich 484 (1977). Such support for the Panel's findings in this case is clearly found in the testimony of Complainant and his sister. While the testimony to the Panel addressed several disputed factual issues, we have traditionally deferred to the Panel's opportunity to assess the demeanor and credibility of the witnesses. The Board notes that Mr. Sherwin acknowledged to the Panel that he was retained to file a supplemental brief and Motion for Bond (Tr. p. 97), and he acknowledged a communication to the Grievance Commission in which he stated that a Motion for Bond had been prepared and could be filed but that "I am refusing to do so because of the total confusion on being paid, and total confusion with dealing with two or three or four people." (letter dated February 3, 1986, Tr. p. 102).

A defense by the Respondent that he was under no obligation to proceed while there was a dispute as to fees is contradicted to some extent by Respondent's letter to his client dated September 27, 1985 [Respondent's Exhibit #4] notifying his client that a substitution of attorneys had been mailed to the attorney of record and that "as soon as he signs it and returns it to our office, I will have it filed and then we'll file the Motion for Bond." The record is clear that although the substitution was returned, no motion for bond was ever filed.

In any event, the Hearing Panel quite correctly included in its Report the observation that a lawyer who has accepted a retainer to represent a client must "exert his best efforts wholeheartedly to advance the client's legitimate interests with fidelity and diligence until he is relieved of that obligation . . . the failure of a client to pay for services does not relieve a lawyer of his duty to perform them completely and on time. . ." State Bar of Michigan v Daggs, 385 Mich 729 (1971).

The Petition for Review filed by Respondent raises three grounds for appeal: 1) that Respondent's good faith and a lack of prejudice to the client should have resulted in the dismissal of the charges of misconduct; 2) the Panel erred in receiving evidence regarding Respondent's prior disciplinary record before ruling on the charges of misconduct; and 3) that the 180 day suspension imposed by the Panel was excessive.

As discussed above, the Board finds that the Hearing Panel's findings and conclusions were supported by the record and should be affirmed. We must emphasize, however, our rejection of the arguments submitted by Respondent that the charges of misconduct would be barred had the Panel concluded that Respondent acted in good faith and that his inaction did not materially prejudice his client. The cases cited by Respondent in which courts have found no liability in professional malpractice cases are not applicable in these proceedings. While a Respondent's good faith and, to a lesser extent, the lack of injury to the client, may constitute mitigation in some cases, those factors would not afford complete exoneration. This is particularly true in the instant case. The Respondent requests that we speculate that Mr. Hamacher would still be incarcerated even if the promised documents had been filed and that the client was therefore not “injured”. By his agreement to act as Mr. Hamacher's appellate counsel, the Respondent had a special duty to exert his best efforts on his incarcerated client's behalf and this was especially true in light of his statement to his client that he could hope to be out of prison "by the end of the summer."

Although the Hearing Panel should not have considered evidence regarding Mr. Sherwin's prior disciplinary history before reaching a decision on the charges of misconduct, we hold that the error did not result in substantial prejudice and does not require a remand to a new panel. The record in this case does not contain any evidence that the disclosure of that information constituted a prejudicial error resulting in a miscarriage of justice within the meaning of MCR 9.107(A). We note that the information was not interjected by counsel for the Grievance Administrator and that no objection to the panel member's question was raised at the hearing.

Finally, the Respondent urges that the suspension of 180 days be reduced. While prior misconduct should not be a factor in deciding whether the allegations of misconduct have been established, prior discipline is well recognized as an aggravating factor which may warrant an increase in the discipline which would otherwise have been imposed. This Respondent has been disciplined on two prior occasions, receiving a Reprimand and a two year suspension. However, the sanctions were imposed in 1971 and 1974, respectively and we believe that the passage of an extended period of time will, in most cases, diminish the aggravating effect of such prior discipline.

MCR 9.123(B) requires that an attorney suspended for a period greater than 119 days establish his or her eligibility to return to the practice of law by filing a petition with the Supreme Court, undergoing further investigation by the Grievance Administrator and appearing before a new panel to establish his or her fitness to practice law. We are unable to conclude that Respondent’s transgressions in this case warrant such proceedings, and we therefore reduce the discipline in this case to a suspension of 119 days. At the end of that suspension, Respondent may file an Affidavit of Compliance as provided by MCR 9.123(A).

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