

GRIEVANCE ADMINISTRATOR

v

MICHAEL L. OESTERLE,  
A Member of the State Bar of Michigan,  
Respondent-Appellant

File No: DP-139/83

Argued: May 11, 1984  
Decided: February 8, 1985

BOARD OPINION

The Formal Complaint alleged that the Complainant, Mrs. Shirley Larkins, retained the Respondent, Michael L. Oesterle, in September of 1979, for the purpose of amending a divorce judgment to increase child support payments.

Mrs. Larkins stated that she gave Respondent several documents relating to the divorce settlement and asked him to seek an increase in child support payments and payment of various medical bills. Mrs. Larkins stated that she offered to pay the Respondent a retainer fee, was told that she would receive a bill when the work was completed and that Respondent told her that the motion would be in court within thirty days of her contact with the Respondent in September of 1979.

Mrs. Larkins stated that she called and met with Respondent on numerous occasions between 1980 and 1983 and was told each time that the court was very slow and that he was having difficulty procuring a court date for hearing on his petition for additional support. She states that when she spoke to Respondent in April of 1981, she was told that he would attempt to have the weekly child support payment at least doubled for the oldest child. She further testified that in January of 1982, she was told by the Respondent that a hearing date was set for January 25, 1982, and that she subsequently received a typewritten notice from Respondent's office to appear in the Jackson County Circuit Court on January 25, 1982. According to Mrs. Larkins, Respondent told her on January 24, 1982, that the hearing had been postponed. No documentary evidence of this communication was supplied and the Respondent denies having indicated that a hearing had been scheduled.

Mrs. Larkins stated that she had contact with Respondent both by telephone and in person. Mrs. Larkins and her husband stated that they met with the Respondent in March of 1983, and that he told them a court date was set for March 25, 1983, in Jackson County Circuit Court. Mrs. Larkins also stated that Respondent called her on March 25, 1983 to inform her that it was unnecessary for her to come to the hearing because he had the Judge's permission to appear on her behalf.

Mrs. Larkins also stated that Respondent spoke with her in April of 1983, to advise her that the March 25, 1983 hearing was postponed because the Judge had requested medical reports concerning her son, for whom she was asking an increase in support. Thereafter, she Sent the medical reports to the Respondent.

At the Panel hearing, Respondent produced evidence contradictory to complainant's testimony, to wit: the child's medical reports as well as a cover letter and the enclosing envelope which was postmarked March 21, 1983. Petitioner later amended her testimony under cross examination and stated that the medical reports were sent on March 21, 1983, which was prior to the March 25th court date to which petitioner testified. This amended testimony, of course, conflicts with the Complainant's earlier testimony indicating that the medical reports were not requested until April, 1983.

Mrs. Larkins claims that she told Respondent on several occasions to return her papers if he was not interested in pursuing the matter, and that Respondent assured her that he would assist her to tier satisfaction. She testified that she spoke with respondent in May of 1983, and was told by Respondent that he had received a judgment on her behalf which was mailed to her. She testified that she received the order on May 24, 1983, and that the order was marked /s/ (indicating that it had been signed by Circuit Judge Noble) and was dated May 2, 1983.

Mrs. Larkins testified further that she called the Respondent on May 24, 1983, to confirm the validity of this purported order due to the fact that one of the children named in the order had reached 18 years of age and would no longer be eligible for the support requested. She also claims that she pointed out to the Respondent that the order did not bear a state court seal, although it was stamped "certified true copy." Complaint confronted the Respondent indicating that she had checked with the Jackson County Circuit Court and was informed that no such order was on file. She testified that the Respondent assured her that the copy sent to her was a true copy of the original order on file.

The Respondent completely denies that the alleged telephone conversation of May 24, 1983 took place and produced at the Panel hearing a court order indicating he was scheduled for trial on the date of alleged telephone conversation. Later, before the Board, Respondent produced an affidavit of a court reporter stating that Respondent was in court at the time of the alleged telephone conversation. The Board finds that this affidavit is not timely offered and will not be considered.

The Complainant filed a Request for Investigation with the Attorney Grievance Commission on June 2, 1983, and Respondent submitted his answer thereto on June 28, 1983. On July 20, 1983, the Grievance Administrator requested that Respondent provide additional full disclosure of all facts regarding the purported order of Judge Nobel. Respondent submitted an additional reply on August 2, 1983. The Formal Complaint was filed on September 10, 1983, which in addition to the allegations made by the Complainant, stated that Respondent did not make a full disclosure regarding the purported order as requested.

In the panel hearing, Respondent's testimony conflicted sharply with that of the Complainant, Mrs. Shirley Larkins. He stated that while he may have met and briefly discussed some matters with the Complainant, he was not retained to do any work for her until he received the letter and medical reports which were postmarked March 21, 1983. The Respondent states further that he filed a petition for increase in child support on behalf of Mrs. Larkins on June 3, 1983, and subsequently postponed because of the grievance filed by the petitioner.

Respondent also stated that while lie may have prepared an order prior to the filing of the petition, he does not know how Mrs. Larkins obtained it. lie denies that he or his office staff ever marked the order indicating that it had been signed by the Judge. He stated that he told the Complainant that the order was not effective until the hearing was held.

The Respondent testified that he requested payment of legal fees from Mrs. Larkins which were not paid and that she did not request return of her papers or terminate the attorney-client relationship.

Mr. John Ricci, a handwriting expert, testified before the Panel that, while he could not give an absolute finding, it was his opinion that the month, day, and year written on the purported order from Judge Nobel was probably not signed by the Respondent, any member of his staff, the Complainant or her husband, although this finding was not conclusive and the record does not contain an explanation of the criteria or specific basis for Mr. Ricci's analysis.

Based upon the testimony of the Complainant and her husband, as well as that of the Respondent, the hearing Panel determined that a preponderance of the evidence was present to demonstrate that the Respondent had made substantial misrepresentations to his client and had issued the false order from his office. As a result, the Panel imposed a two-year suspension which was appealed by both parties.

#### DISCUSSION

The Board is faced with a dilemma in weighing the conflicting testimony of client-complainant and the Respondent, and in determining an appropriate level of discipline based upon a degree of culpability as supported by the record. The testimony and documentary items submitted by the Grievance Administrator are persuasive but incomplete and, in some areas contradictory. It has not been established by a preponderance that the Respondent actually prepared or caused the preparation of a false court order; likewise, there is insufficient evidence that the Respondent delivered or caused the delivery of a false order as alleged in Count I of the formal complaint.

Without questioning the veracity or motivation of the Complainant, substantial doubt remains regarding the Respondent's involvement in the preparation, delivery and representations of the purported court order. The Complainant testified concerning the conversations that she had with the Respondent subsequent to her receipt of the false order; she was mistaken regarding the month of the calls at several points. The telephone conversations of May 24, 1983, wherein Respondent allegedly confirmed that the order was indeed official, are reflected on the phone bill as having a duration of one and three minutes; yet, the purported nature and content of this conversation as described by the Complainant raises serious doubts about the Complainant testimony on this important point (See Panel transcript pp. 43, 44, 45, 46, 83, 84, and 85).

In addition, although a minor factor, the Complainant was unable to produce the envelope in which the order was delivered to her; she had produced envelopes for all other documents delivered to her. While the burden of proof is on the Grievance Administrator to prove these serious

charges, it is not expected that a client will maintain records in the same manner expected of an attorney (such as the envelope containing the purported order).

The credibility of both parties is subject to question. Unfortunately, there are insufficient records produced to fully establish or fully negate the credibility of either party. Furthermore, one must ask what the purpose and motivation of the Respondent would be in preparing such an order. Would such an act be undertaken to satisfy the impatience of a neglected client? Perhaps so, but the argument of Respondent's counsel warrants careful consideration; the order in question was easily verified and would have served no purpose unless the Respondent followed up with procurement of a valid order or took some other steps to fully satisfy his justifiably impatient client.

In order to find this Respondent guilty of fraudulent misconduct, it is necessary to demonstrate an intent to deceive by a preponderance of the evidence. Respondent admitted that he had prepared an order, indicating that it was merely a proposed order and that it may have been given to the Complainant by some Office in Illinois of the Office without his knowledge. Respondent stated that such orders had been prepared early in other attorney-client relationships for the purpose of demonstrating to clients the relief to be requested.

If the charges by the Complainant are accurate, they point to substantial wrongdoing. The statements of the Complainant allege that Respondent misinformed her for a period of about four years concerning the status of her case and that she lost a substantial amount of money in child support payments. The Respondent is unable to explain how the Complainant acquired the purported order.

He argues further that a fake order prepared by an attorney would not have been stamped "certified true copy" because the local courts do not use such a stamp.

The misconduct alleged here is of a very serious nature and the consequences of these proceedings are of grave concern to the future of this attorney. Notwithstanding some persuasive evidence and our general policy of deferring to the judgment of the Hearing Panel where credibility is concerned, we find that the charge in Count I charging misconduct with regard to the order is not substantiated by a preponderance of the evidence.

With regard to the charges in Count II, to wit: that Respondent failed to make a full and fair disclosure in his answer to the Request for investigation regarding issuance of the false court order allegedly marked by the Respondent in order to deliberately mislead the client, we would dismiss the charge. The Respondent, in his first answer, stated that a proposed order was prepared and that the client was advised that the order was not effective until the hearing was held (See Grievance Administrator's Exhibit C). When asked by the Grievance Administrator to elaborate on this point (See Grievance Administrator's Exhibit D) Respondent replied indicating that he did not recall the circumstances under which the order was mailed and had no knowledge regarding the misleading markings on the order (See Grievance Administrator's Exhibit E)

Since the evidence regarding issuance of a false order is deemed to be insufficient, the added answer of the Respondent in his letters to the Grievance Commission relative to his issuance of a proposed order should be accepted as satisfactory. On the other hand, Respondent's lack of candor before the Hearing Panel is a damaging aggravating factor. He took the position that he did not represent the Complainant for much of the time period in question; if he believed this, his mode of handling and attitude toward potential clients seeking help leaves much to be desired.

This Respondent, who has been a member of the Bar for seven years without prior disciplinary action, severely neglected the child support matter for which he was retained, violating Canon 6, DR 6-101(A)(3). We do find the evidence sufficient to support the Panel findings of neglect aggravated by intentional misrepresentations to the client regarding the scheduling of hearings and purported inaction on the part of the court, in violation of Canon 1, DR 1-102(A)(4-6). Furthermore, the evidence, including testimony of the Complainant and her husband regarding repeated contacts with the Respondent, supports the charge that the Respondent intentionally failed to seek the lawful objectives of his client in violation of Canon 7, DR 7-101(A)(1)(2).

The Hearing Panel Order of a two-year suspension shall be modified to a 121-day suspension; this will require reinvestigation and a new hearing prior to reinstatement.

ALL CONCUR (Board Members Reamon, Denning, Keating, Cote, and Vincent participated in the hearing, deliberation and decision).