

IN THE MATTER OF ALVIN C. SALLEN,
A Member of the State Bar of Michigan,
Respondent,
File No. DP-52/81

Decided: September 17, 1982

OPINION OF THE BOARD

Respondent was appointed appellate counsel in a criminal case for complainant in 1977. Respondent did not pursue the appeal in a timely manner, due in part to misinformation received from Recorder's Court. At the time Complainant filed a Request for Investigation, Respondent was again moving forward on the appeal, and the Complaint was dropped. Subsequently, the Grievance Administrator reopened the case and a Formal Complaint was filed. The hearing panel issued an order of reprimand which was appealed by the Respondent. We reverse and dismiss the Formal Complaint.

Complainant was convicted of a felony in Recorder's Court on May 31, 1977. A timely claim of appeal was filed with the Court of Appeals, but an erroneous file notation on the Recorder's Court file indicated the claim of appeal was not timely filed [Ex. 2]. On September 29, 1977, Respondent was appointed appellate counsel. Relying on information received by telephone from a clerk in Recorder's Court, Respondent informed Complainant that his claim of appeal had not been timely filed [Tr, 55; November 3, 1981]. Respondent did not personally examine any part of the court file. Although Complainant knew there was a mistake of some kind, he took no step to inform Respondent [Tr, 125-126; October 1, 1981; Exhibit 10].

Respondent informed Complainant that delayed leave to appeal would have to be filed. Respondent went to Jackson Prison to meet with Complainant. At the prison Respondent was incorrectly informed that Complainant had been paroled. Actually, Complainant had been transferred to the Riverview facility at Ionia. At this point communication between Respondent and Complainant ended.

Complainant filed a Request for Investigation on September 14, 1979. On October 10, 1979, Respondent filed a Motion for a New Trial and thereafter, met with Complainant at Ionia. After a hearing, the motion for a new trial was denied. Complainant maintains that because he was at the motion hearing he missed a parole hearing at which he claimed he would have received parole [Tr, 68; November 3, 1981]. Complainant requested Respondent be removed as counsel. The Circuit Court denied this request.

Application for leave to appeal was filed November 1, 1979. Leave was denied. Correspondence from the Court of Appeals indicates that the untimeliness of the appeal had no bearing on the decision [Tr, 46-47; November 3, 1981; Exhibit 17]. Complainant was paroled in November, 1980.

Although the hearing panel made a specific finding of fact that Complainant's right of appeal

had not been lost due to neglect, a reprimand was ordered for general neglect of the appeal matter. We find that the record fails to support a finding of neglect.

In our opinions in In re Daggs, 1 Mich Discip Rptr 178 (1979) and In re Harrington, 1 Mich Discip Rptr 75 (1979), the Board stated that timely handling of criminal appeals is of critical importance to the client and the profession. With this in mind, but also considering the relevant facts of this case, the Board finds there is a close question presented on the issue of Respondent's duty to personally examine the trial court file. However, we conclude Respondent's reliance on the information received from Recorder's Court clerk, while less than prudent, does not constitute neglect of a legal matter within the scope of Canon 6. We hasten to add a note of caution regarding such verbal communications: attorneys should personally examine court files to determine case status -- especially with regard to information bearing upon fundamental rights and privileges of a client.

A secondary issue presented by the Respondent is whether the Grievance Administrator is estopped from pursuing a complaint after it is initially dropped. We find no legal basis for such an estoppel defense. Since the bifurcation of the discipline mechanism in 1978, the Grievance Commission has been charged with the prosecutorial functions of the process [GCR 958.1(6), 957.1], and the Attorney Discipline Board has been the adjudicative arm [GCR 959.1]. It would be inappropriate to attach jeopardy at the investigatory stage. One could analogize the Attorney Grievance Commission's role and actions here to that of a criminal prosecutor who declines to file criminal charges after an investigation and is not barred from reopening the case and filing formal charges at a later date.

The issue of the termination of the attorney/client relationship need not be determined in order to reach a decision in this case, inasmuch as no misconduct has been found by the Board. However, the Board takes this opportunity to expressly reject Respondent's contention that there must be prejudice to a client before a finding of neglect can be supported. Material damage to a client's interests is not a prerequisite to discipline for neglect.

The order of the hearing panel is vacated and the Formal Complaint is dismissed.

ALL CONCUR.

Mr. Reamon concurring specially:

In this case I would invoke the British procedure of dismissing the charges of neglect as "not proven."