IN THE MATTER OF THOMAS A. NICKELS,
A Member of the State Bar of Michigan,
Respondent,
DP-168/80

Decided: April 1, 1982

OPINION OF THE BOARD

Respondent was charged with: Making False Statements to a Prosecutor regarding the whereabouts of his client in order to obtain an adjournment of a scheduled jury trial; misrepresentation to his client concerning a purported adjournment of the trial; failure to appear on behalf of a client at said trial; failure to explain his client's absence, move for adjournment, or take any other action designed to protect his client's best interest. The Complaint charged violations of GCR 1963, 953(1), (2), (3), and (4), and Canons 1, 6 and 7 of the Code of Professional Responsibility, to wit: DR 1-102(A)(4)-(5) forbidding conduct involving dishonesty, fraud, deceit, or misrepresentation and conduct prejudicial to the administration of justice, and DR 6-101(A)(3) forbidding neglect of a legal matter entrusted to a lawyer, and DR 7-101(A)(1)(2)(3) requiring that a lawyer seek the lawful objectives of his client, carry out his contract of employment with the client, and avoid prejudice or damages to the client during the course of a professional relationship.

The 46th Circuit Hearing Panel found that Respondent had violated all three Canons by failing to protect the interest of his client, neglect, and misrepresentation to the prosecutor regarding the adjournment. The hearing panel did not find that Respondent had made misrepresentations to his client, nor did they find that Respondent failed to appear on his client's behalf at the time of trial. The Board affirms the hearing panel findings that Respondent made misrepresentations to the prosecutor in order to obtain an adjournment; the Board further agrees with the panel that Respondent did not fail to appear on behalf of his client, and that his absence at the time of trial does not amount to actionable misconduct. The Board reverses the finding of the panel that Respondent failed to protect the interests of his client (Canon 7, DR 7-101); nor does the Board find support for a finding of neglect [Canon 6, DR 6-101(A)(3)].

FACTS

There are two complainants in this matter, The Honorable John Mack, Judge of the 88th District Court, and Respondent's former client, Randy Lee. In mid-1979, Lee retained Respondent to defend him on a charge of possession of marijuana. A trial was set before Judge Mack. Prior to the trial date, Respondent requested and received the first of several adjournments. Lee's unusual

work schedule as an over-the-road truck driver necessitated some of these adjournments.

The date eventually set for trial was Tuesday, June 3, 1979, at 9:30 a.m. The Thursday prior to the trial date, May 29, 1979, Respondent approached the prosecutor to obtain his agreement to another adjournment. The prosecutor was told by Respondent that Respondent was unable to locate Lee and would need more time to do so. In fact, Respondent had Lee's address and telephone number. The prosecutor did not agree to an adjournment, nor did he read or sign the Stipulation for Adjournment which Respondent had prepared (Panel Tr. at 84). Notwithstanding the prosecutor's refusal to stipulate to adjournment, Respondent instructed that his secretary send a notice of adjournment to the client. However, Respondent's secretary testified that Respondent, when informing her about the adjournment, indicated some uncertainty about whether the adjournment would ultimately be obtained. The hearing panel concluded that the Respondent did not intend to mislead the client, but apparently accepted Respondent's defense that he had merely attempted to inform the client that the matter might be rescheduled.

On Monday, June 2, 1979, after Respondent was unable to change the prosecutor's mind regarding the adjournment, he contacted his client later that afternoon (Panel Tr. at 188). The trial was scheduled for 9:30 the following morning. The client replied to Respondent that due to the short notice, the long drive from Lee's home to the Court, over 300 miles, and difficulties connected with his job, he would not be able to attend the trial. Respondent and his secretary apparently contacted the client several times on the evening of June 2nd, but the client continued to insist that he could not appear the following day.

On June 3, 1979, Judge Mack called his Court to order at 9:40 a.m. and found neither the client, Lee, nor Respondent present. Respondent was then across the street at another Courthouse. He had informed Judge Mack's court clerk shortly before Lee's trial was to begin that his client would not be present and that he would return shortly. However, Judge Mack discharged the jury and found both Respondent and Lee in contempt for failing to appear at 9:30. Respondent returned to Judge Mack's court at about 10:00 a.m., but contempt citations had by then been issued.

DISCUSSION

Respondent appears to raise a number of issues in his Petition for Review and brief, most of which we find meritless and unnecessary to discuss. Respondent's assertions of ill feelings by Judge back toward Respondent may have been a factor in the development of this case; however, the record clearly shows that Respondent is guilty of misrepresentations to the prosecutor

warranting discipline. Other facts in the record, some of which have been rejected by the hearing panel and the Board as failing to amount to misconduct, tend to aggravate the misconduct which occurred. The Board points specifically to Respondent's failure to keep his client accurately and timely informed regarding the hearing date. Also, although the Board, as discussed below, agrees with the panel that Respondent did not commit misconduct in his failure to be present at the time of the trial, under the circumstances it was incumbent upon Respondent to account to the Court and remain as available as possible to explain his client's absence. This is especially true in light of the fact that Respondent, although not making his client's appearance impossible, incorrectly lead the client to believe an adjournment could be obtained.

Nevertheless, the Board affirms the hearing panel finding that the charge of failure to appear in Court does not amount to actionable misconduct (Hearing Panel Report at p.3, paragraph 5). The record shows that Respondent appeared prior to the time of trial on the date set. Respondent will be afforded the benefit of the doubt regarding his understanding that local Court practices would permit his temporary absence from the Courtroom just prior to the start of trial.

Regarding the misconduct which is found the misrepresentation to the prosecutor-the record supports the finding that Respondent did, in fact, have his client's address and telephone number and was able to contact the client. The record also supports a finding that the Respondent misled the prosecutor.

> "And I [Respondent] said, "Dave [the prosecutor], you told me last week you were going to adjourn this thing * * * I don't know where my client [Lee] lives." * * * So I took [the file] back to the office and I said, "Marcia [the secretary]," I said, "Have you contacted Mr. Lee about an adjournment in this case?" And she said, "I sent him a letter" And I said, "You better get him on the phone."" Panel Tr. at 204-205. (Emphasis added)

This testimony reflects that Respondent was not dealing honestly with the prosecutor, representing that he did not know his client's whereabouts.

The Board differs with the panel finding regarding the allegation that Respondent failed to protect his client's interests as required by Canon 7. It could be said that Respondent had a continuing obligation to protect the client after

the contempt citations had been issued. However, Respondent urges that the client was informed that he should obtain other counsel at that point in the proceedings, and in light of possible differing interests between Respondent and his counsel and the fact that Respondent had also been cited, the Board rejects the charges of failure to protect the client in this context.

Regarding the allegation that Respondent made misrepresentations to his client concerning the adjournment, we agree with the panel that Respondent's communications to the client were intended to signal only that an adjournment could or would be granted. Of course, this is considered an aggravating factor, inasmuch as it unduly misled the client and may have contributed as a false signal to the client's difficulties in ultimately arranging for his appearance on the date of trial. However, the record does not support a finding that this communication made it impossible for the client to appear. In fact, the client was contacted on the evening before the trial and was clearly instructed that the trial would proceed and that he must appear. Therefore, we find no basis for reversing the panel finding on this point.

The Board notes that Respondent was admitted to the Bar in 1976 and received a reprimand in 1980. In the prior disciplinary proceeding it was determined that Respondent caused the words "S/Judge Harrison" to be placed on the signature line of a proposed Circuit Court Order allowing the late claim of appeal from a decision of the Michigan Employment Security Commission. The panel in that prior case determined that Respondent knew or should have known that the proposed Order granting a delayed claim of appeal signified that it was a copy of an original Order and would mislead the Employment Security Commission and their attorneys. The panel did not specifically conclude that Respondent knowingly and intentionally misled the MESC at the time the indication of signature was placed on the Order; however, the panel found that Respondent at some point became aware that the Attorney General and the MESC were misled by said proposed Order, and that Respondent failed to take further action to explain, clarify or rescind the proposed Order despite requests from the Circuit Judge Michael Harrison to do so in violation of Michigan General Court Rule 953(1) forbidding conduct prejudicial to the proper administration of justice.

The aggravating facts and circumstances reflected in the record of this case, together with the prior record of misconduct, lead the Board to conclude that substantial discipline is warranted. The diligence and careful consideration of the hearing panel is also amply reflected in the record. However, the Board, based upon its overview experience of similar matters, feels that the suspension of 120 days rendered by the panel is somewhat excessive. Respondent's relative inexperience and his otherwise

competent representation of his client are considered, and the discipline shall be reduced to a reprimand, with a warning to the Respondent that any future transgressions would constitute an attitudinal pattern calling for more serious disciplinary action.