

IN THE MATTER OF JOHN M. HOFFMAN,
A Member of the State Bar of Michigan,
Respondent
No. DP-93/80

Decided: March 18, 1981

OPINION OF THE BOARD

Respondent was appointed by the Allegan Circuit Court to act as counsel in a criminal appeal. The indigent client had been convicted of a felony, and sentenced to serve seven and a half to fifteen years in prison. The client had a right of automatic appeal if filed within sixty day after the court appointment. The order appointing Respondent was entered July 13, 1979, and the time for an appeal as of right expired September 13, 1979, without an appeal having been filed. After this initial period, it became necessary to ask the Court of Appeals for leave to appeal. Respondent did not request permission to withdraw from the assignment, although he had performed little appellate work in the past. Tr. at 29.

Respondent did not file a claim of appeal, or take any other action to perfect the appeal, or extend the time available for its filing. Respondent claims to have filed a delayed appeal with the Court of Appeals, which was purportedly rejected by the Court as improperly framed. Tr. at 15. The Court of Appeals has no record of such a delayed appeal having been filed. Exhibit No. 3.

Respondent was charged by the Grievance Administrator with neglect for failing to file the appeal. The Grievance Administrator also alleged that Respondent failed to perfect an application for leave to appeal after the initial period passed, but later withdrew a separate charge of failure to consult with the client about the case. Tr. at 9. Respondent admitted neglect of the appeal, but denied that he failed to consult with the client.

Respondent told the panel, Tr. at 18-19, that he had had difficulty gathering sufficient information to present a meritorious appeal, until after the time for the automatic appeal had lapsed. Respondent apparently received late information concerning the client's mental health which would have had a bearing on the appeal. At the same time, however, Respondent admitted his neglect. He said he will acknowledge fault for the delays in the appeal by making express statements in the application for delayed appeal he plans to file. Tr. at 22. He admitted there was no excuse for failure to answer the Formal Complaint. Some distractions due to family problems were mentioned, Tr. at 23, but Respondent denied there were mitigating circumstances. Tr. at 29.

The hearing panel, nevertheless, found several factors in mitigation, including Respondent's partial attempts to contact the client and client's family; and Respondent's sincere belief that there was no basis for filing an appeal at the time and before expiration of the automatic appeal period.

The panel imposed a reprimand. They did so, however, after the Grievance Counsel mistakenly informed them in Respondent's presence that Respondent had no prior record of discipline. In fact, Respondent received a reprimand in 1972, and a thirty-day suspension in 1977. Despite hearing the incorrect statement, Respondent did not notify the panel about this factual mistake, The panel announced its intention, based in part upon this erroneous information, to impose a reprimand, and later entered such an order. We are urged to remand to allow the panel to amend discipline in light of the corrected facts. We think it unnecessary to remand, however, since GCR 1963, 967.3(a) empowers the Board to make review decisions upon "the whole record," After examining the entire record, we think Respondent should receive a suspension of 120 days.

Respondent is a recidivist. He has committed various misconduct in the past, including failure to answer Formal Complaints, as here. He failed to appear, or to arrange for counsel to

appear in his behalf, at the Board hearing in the present matter. Bd. Tr. at 1. All of this indicates “a conscious disregard for the Rules of the Court,” Schwartz v Ruebelman, No. 36427-A (Mich. Att’y Discip. Bd. 1980), and failure to fulfill his responsibility to the disciplinary process. Respondent did admit, before the panel, his neglect in failing to pursue an appeal for his client. Overall, Respondent presents a pattern of misconduct which the Board cannot overlook.

The Board has dealt with several cases in which court-appointed attorneys neglected criminal appeals. In Ruebelman, supra, we increased Respondent's suspension from 120 to 121 days. The Respondent had a prior record, failed to answer Requests for Investigation, and failed to take appellate action on behalf of a criminal defendant whom he had been appointed to represent, In re Harrington, No. 35542-A (Mich. Att’y Discip. Bd. 1979), Respondent failed to communicate with his client, or to proceed with the criminal appeal. Despite mitigating evidence, the Board increased discipline from a reprimand to a suspension of sixty day. In re Daggs, No. 35447-A (Mich. Att’y Discip. Bd. 1979), Respondent was suspended for one year for misconduct including neglect of a criminal appeal he had been appointed to pursue.

The duties of court-appointed counsel in criminal appeals have also been the subject of a State Bar Formal Ethics Opinion. Mich. Formal Ethics Op. No. 203 (1965). In that opinion, the responsibilities of such attorneys are set out in some detail. Particularly pertinent are directives that attorneys are “bound to present every available defense or lawful proceeding in behalf of the indigent client.” In addition, an appointed attorney's obligations include “the exercise of his judgment, based upon his knowledge of the law, as to the appropriate legal remedy to set forth.” The attorney may also request the court’s permission to withdraw “for good cause.” Although Respondent made some attempts to pursue the appeal, and claims an Intention to pursue it in the future, he has not fulfilled the requirements set out in the Ethics Opinion. Some mitigation is presented, but mitigation inevitably appears less persuasive as a Respondent extends his trail of misconduct. Mitigation never extinguishes misconduct but, at most, supplies a reason to enter a lesser amount of discipline. See In re Ziegler, No. 33442-A (Mich. St. B. Grievance Bd. 1976). In light of Respondent's neglect in this case, and after considering his previous misconduct, we affirm the panel's findings of fact, and increase discipline to a suspension of 120 days.

AFFIRMED AS MODIFIED.