

Grievance Administrator,
Petitioner/Appellant,
William A. Freeman, Sr.,
Complainant/Appellant,

v

Edgar Dew, P 34140,
Respondent/Appellee.

96-292-GA

Decided: April 28, 1999

SUPPLEMENTAL BOARD OPINION
(On Remand)

On September 22, 1997, Tri-County Hearing Panel #16 issued its report that the charges of misconduct alleged in the formal complaint in this matter had not been established by a preponderance of the evidence. The panel entered an order of dismissal in accordance with MCR 9.115(J)(4). The Grievance Administrator and the complainant, William A. Freeman, Sr., filed petitions for review with the Attorney Discipline Board in accordance with MCR 9.118. On February 27, 1998, the Board issued its order affirming the hearing panel's dismissal.

The Grievance Administrator filed an application for leave to appeal in the Supreme Court. On December 1, 1998, the Court remanded this case to the Board with directions to write an opinion that "provides a rationale for [the Board's] conclusion that the ' dismissal is the appropriate result under all of the facts and circumstances in this case. ' " The Court retained jurisdiction.

Upon reconsideration, we now conclude that our previous order was erroneously entered. Respondent's failure to inform his clients of the Court of Appeals' February 15, 1995 dismissal until after the Supreme Court had denied leave in November 1995 was a violation of Michigan Rule of Professional Conduct 1.4 and constituted professional misconduct. We therefore vacate our prior opinion and submit this supplemental opinion.

The procedural history of respondent's representation of William A. Freeman, Sr. in a workers' compensation matter under the title William A. Freeman v Borman's Inc. is set forth in some detail in the hearing panel's report. Respondent's acts and omissions during that representation are essentially undisputed, including respondent's failure (by one day) to file a timely appeal with the Court of Appeals following remand to the Workers' Compensation Appellate Commission.

Although the formal complaint alleged that the tardy filing itself was misconduct, the primary issue on appeal involves the respondent's failure to inform his client of the tardy filing and his apparent failure to clearly advise his client of the basis for the Court of Appeals' dismissal. The client did not learn of these events until after the Supreme Court ultimately denied leave to appeal from the Court of Appeals. The Administrator argues that the panel erred in dismissing the case because respondent violated MRPC 1.4 in two respects: (1) He failed to notify his client of the late filing dismissal for "over a year"; and, (2) He made false statements to his client to conceal the reason for the dismissal.

MRPC 1.4 provides that:

- a) A lawyer shall keep a client reasonably informed about the status of a matter and comply promptly with reasonable requests for information. A lawyer shall notify the client promptly of all settlements offers, mediation evaluations, and proposed plea bargains.
- b) A lawyer shall explain the matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

On reconsideration, we conclude that the undisputed facts regarding respondent's delay in informing his client of the late filing and dismissal by the Court of Appeals established a violation of MRPC 1.4.

In its written report on misconduct, the hearing panel wrote:

The complainants had no problem with their communications with Mr. Dew up until the time that he missed the filing date with the Court of Appeals on the issue of the penalty. Correspondence shows that he had regularly corresponded with him and told him the steps he was going to take in order to protect their interests. He did not inform them when he missed the filing date, that he had missed the filing date at all, nor he did inform them when he had thereafter received the dismissal from the Court of Appeal. In fact, he did not communicate with them at all from the period of February until November. He sent them a copy of the order from the Supreme Court denying his leave to appeal. Upon receiving this, the complainants wondered rightfully what happened in the Court of Appeals and wrote him a letter requesting that information. Mr. Dew replied with a letter to them stating that appeal in the Court of Appeals hadn't been solely denied because of his later filing and arguing that their rights had not been prejudiced by the late filing. [HP Report, 9/22/97, p 9]

After discussing the failure to file issue the panel continued:

The failure of Mr. Dew to correspond with his client and to disclose fully and fairly is more troublesome. Mr. Dew clearly did not correspond with his client between the time he failed to file the appeal in a timely matter and the time he received the denial of the application for leave to appeal [from the Supreme Court].

However, there was also no testimony that the client, during this period of time, had attempted to contact Mr. Dew. His client's input

at that time would have added nothing to Mr. Dew's representation nor was there any indication that if Mr. Dew had informed his client that he had failed to timely file the appeal with the Court of Appeals that any other lawyer could have done anything more to advance complainant's cause.

* * *

Further, the failure to communicate was not all one-sided. The testimony shows that complainants had not contacted respondent until after receiving the Supreme Court opinion. [HP Report, 9/22/97, pp 11-12.]

At the outset, we note that respondent was not relieved of his duty under MRPC 1.4 to provide timely, relevant information to his clients even if the clients were not regularly or persistently requesting information about the case. In a recent opinion, the Board considered an attorney's argument that he did not reply to the client's written requests for information about a case because those requests had apparently been sent to the wrong address. In affirming the panel's finding of misconduct under MRPC 1.4 in that case, the Board said:

Even if we accept respondent's claim that he did not receive those letters from his client, respondent was not absolved of his critical responsibility under MRPC 1.4 to keep his client "reasonably informed" about the status of a matter or his ongoing duty under MRPC 1.4(b) to explain the matter to his client "to the extent reasonably necessary to permit the client to make informed decisions about the representation." The duty to communicate imposed by MRPC 1.4 is imposed on the attorney, not on the client. [Grievance Administrator v Hayim Gross, 97-138-GA; 97-165-FA (ADB 1999).]

MRPC 1.4(a) imposes a specific obligation on an attorney to comply promptly with reasonable requests for information. That obligation is separate and distinct from the ongoing duty under MRPC 1.4(a) to keep a client "reasonably informed about the status of a matter" and the further duty under sub-section (b) of that rule to "explain the matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." While respondent may argue in this case that the tardy filing in the Court of Appeals was not particularly consequential since his client would have ultimately lost on the issue of the right to penalties even if the application for leave had been timely, we are not prepared to say that the dismissal of an appeal filed on behalf of a client is such a trivial or inconsequential event that it need not be disclosed to the client. Certainly, such disclosure can be accompanied by the lawyer's explanation of the applicable law, the reasons for the dismissal, the remaining options available to the client, the remaining chances for success and the impact such a dismissal might have on the eventual outcome of the case. Generally speaking, however, a client who has not been advised that his or her appeal has been dismissed has not been reasonably informed about the status of the matter and has not been given a reasonable opportunity to make informed decisions regarding that representation.

Turning to the charge that respondent made a deliberately false statement to his client to conceal the reason the appeal was dismissed, we believe that there is evidentiary support in the

whole record for the panel's conclusion that respondent's letter, taken as a whole, did not constitute a deliberate misrepresentation. However, we reach this conclusion based solely upon the evidence and we do not endorse any implication in the panel's report that an attorney may avoid the duty to deal honestly and forthrightly with a client so long as the communication is "artfully worded."

Respondent's letter to Mr. Freeman dated January 24, 1996 (Petitioner's Exhibit #10) must be read in its entirety. After reminding his client that his workers' compensation case presented separate and distinct issues regarding Mr. Freeman's entitlement to benefits and his entitlement to penalties, respondent advised his client on page 2 that:

Thereafter, as you refer to in your letter of December 7, 1995, an appeal of the issue of the penalties was late in getting into the Court of Appeals and therefore they denied our petition for leave to appeal on that issue alone.

Throughout these proceedings, it was respondent's position that, notwithstanding the denial of the petition for leave on the issue of penalties, the substantive issue of the client's entitlement to worker's compensation benefits was preserved and remained subject to review by the Supreme Court. It was in that context that respondent advised his client, two paragraphs later in the letter of January 24, 1996, that the Court of Appeals did not deny application for leave "solely" because it was untimely filed and, in respondent's opinion, the issue of the client's entitlement to workers' compensation benefits was preserved.

The issue before the panel was not whether or not respondent's legal reasoning was correct but whether or not respondent was shown, by a preponderance of the evidence, to have made deliberately false statements to his client. We affirm the panel's conclusion that such misconduct was not established, based upon a fair reading of all of the evidence.

Having found that the hearing panel's order of dismissal should be vacated, we conclude that respondent should be subject to an order of discipline for his failure to communicate adequately with his client in violation of MRPC 1.4(a) and (b). Because the complaint was dismissed by the hearing panel, we recognize that the parties have not had an opportunity to present evidence of aggravating or mitigating factors as contemplated under MCR 9.115(J)(3). Some factors which would normally be considered in determining an appropriate level of discipline, such as the otherwise competent and diligent representation provided by respondent, appear in the existing record. The Board and the Court may take notice that respondent has not previously been disciplined since his admission to the bar in 1982. Based upon the existing record, the Board would be inclined to order a reprimand in this case. However, the Board also recognizes that the Administrator has not had an opportunity to disclose confidential admonitions or contractual probation agreements, if any, which are admissible under MCR 9.115(J)(3) and the parties have not specifically addressed the issue of the level of discipline.

The Court having retained jurisdiction, we therefore file this supplemental opinion with the Clerk of the Court for such further action as the Court may deem appropriate.

By _____
Albert L. Holtz, Chairperson