STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellee,

v

Ernest Friedman, P 26642,

Respondent/Appellant,

Case No. 18-37-GA

Decided: October 8, 2019

Appearances

Kimberly L. Uhuru, for the Grievance Administrator, Petitioner/Appellee
Michael Alan Schwartz, for Respondent/Appellant

BOARD OPINION

Tri-County Hearing Panel #57 of the Attorney Discipline Board issued an order of suspension on June 5, 2019, suspending respondent's license to practice law for 60 days, effective June 27, 2019. Respondent filed a timely petition for review arguing that the hearing panel imposed discipline for misconduct that was either not charged in the formal complaint or lacked evidentiary support in the record, and that the hearing panel improperly utilized the suspension standards found in ABA Standards 4.62 and 4.42(a) and (b). Respondent requested that the Board reverse the hearing panel's order of suspension and dismiss the formal complaint with prejudice.[1] In response, the Administrator asked the Board to affirm the hearing panel's findings of misconduct and the order of suspension.[2]

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[1] Respondent also filed a timely petition for a stay of the order of suspension, which resulted in the automatic stay of the hearing panel's order pursuant to MCR 9.115(K).

[2] The Grievance Administrator has not sought review of the hearing panel's decision to dismiss Count Two of the formal complaint in its entirety, thus that count will not be addressed any further in this opinion.

The Attorney Discipline Board has conducted review proceedings in accordance with MCR 9.118, including review of the evidentiary record before the panel and consideration of the briefs and arguments presented by the parties at a review hearing conducted on August 21, 2019. For the reasons set forth below, we affirm the hearing panel's findings of misconduct and the order of suspension.

I. Panel Proceedings

The Grievance Administrator filed a two-count formal complaint against respondent on April 2, 2018. Count One involved respondent's representation of Aref Musaed in a cause of action against State Farm Insurance Company (State Farm), arising out of a January 7, 2011 automobile accident. The complaint specifically alleged that respondent noticed the depositions of two necessary expert witnesses well after the discovery cut-off date, and, in the case of one of the witnesses, actually two days *after* trial was scheduled to begin. State Farm's counsel did not receive notice of the depositions because they were mailed to the wrong address. As a result, State Farm moved to quash the depositions as untimely. Respondent unsuccessfully attempted to get the trial adjourned and to have substitute counsel handle the trial. On the date set for trial, respondent stipulated to voluntarily dismiss the case and that any re-filing of the case would be on the payment of costs to State Farm. The formal complaint specifically alleged that respondent stipulated to the dismissal of the case and the payment of costs without his client's knowledge or consent.

The complaint further alleged that respondent attempted to re-file the case three separate times. The first time, the court granted State Farm's motion for costs ordering that Mr. Musaed pay $7,438.64 by February 22, 2013, or the case would be dismissed. No costs were paid and the case was dismissed. It was specifically alleged that respondent did not tell Mr. Musaed of the order to pay costs or the dismissal. When respondent re-filed the matter a second time, the court granted State Farm's motion for summary disposition. Again, it was alleged that respondent did not advise Mr. Musaed of the re-filing or the dismissal. Respondent then filed a new action against State Farm on Mr. Musaed's behalf for failure to pay benefits relating to a separate, unrelated automobile accident. Shortly thereafter, Mr. Musaed filed a request for investigation against respondent, who then moved to withdraw from the representation in the pending matter against State Farm.

Count One charged that respondent failed to provide competent representation, in violation of MRPC 1.1, handled the matter without adequate preparation, in violation of MRPC 1.1(b),

neglected the matter, in violation of MRPC 1.1(c), failed to act with reasonable diligence and promptness, in violation of MRPC 1.3, failed to keep Mr. Musaed reasonably informed about his case, in violation of MRPC 1.4(a), and failed to sufficiently explain the matter to Mr. Musaed, in violation of MRPC 1.4(b). It also charged that respondent violated MCR 9.104(1)-(3).

Count Two of the formal complaint involved respondent's representation of Isadore Rutledge in a cause of action against both the City of Detroit and AAA of Michigan, arising out of a 2009 injury Mr. Rutledge suffered when he was hit by a car while operating a golf cart on Belle Isle. That count charged that respondent failed to keep Mr. Rutledge reasonably informed about his case, in violation of MRPC 1.4(a), failed to sufficiently explain the matter to Mr. Rutledge in violation of MRPC 1.4(b), and engaged in conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of criminal law, in violation of MRPC 8.4(b). It was also alleged that respondent violated MCR 9.104(1)-(3).

Respondent filed a timely answer to the formal complaint in which he admitted that he did not advise Mr. Musaed of the stipulation to dismiss his case or that he stipulated that Mr. Musaed would have to pay costs to State Farm upon refiling, but denied as "untrue" that he did not advise Mr. Musaed of the order to pay costs or the dismissal after respondent attempted to refile the matter. (Respondent's Answer, ¶¶ 29 and 34.) Respondent denied that he violated the rules cited in both counts of the formal complaint.

The matter was assigned to Tri-County Hearing Panel #57 and a hearing on misconduct was held before the panel on June 5, 2018. On October 11, 2018, the hearing panel's misconduct report was issued. The panel made the following findings:

> With regard to Count One, we find that respondent handled a legal matter without preparation adequate in the circumstances, in violation of MRPC 1.1(b); neglected a legal matter entrusted to him, in violation of MRPC 1.1(c); failed to act with reasonable diligence and promptness, in violation of MRPC 1.3; failed to explain a matter to the extent reasonably necessary to make informed decisions regarding the representation, in violation of MRPC 1.4(b); and engaged in conduct that is contrary to justice, ethics, honesty, or good morals, in violation of MCR 9.104(3), as charged in paragraphs 41(b), (c), (d), (f) and (i) of the formal complaint.
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> Specifically, the hearing panel finds that respondent neglected the Musaed file, failed to adequately prepare for trial, and failed to

> explain a cost issue to Mr. Musaed, which eventually led to the dismissal of the case. As such, the dismissal was caused by respondent's neglect, and thus asking the client to pay approximately $7,400 in costs necessary to refile the lawsuit was improper and contrary to justice, ethics and honesty.
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> However, the hearing panel finds that the Grievance Administrator did not establish the following allegations from Count One: that respondent failed to provide competent representation, in violation of MRPC 1.1; failed to keep a client reasonably informed about the status of a matter, in violation of MRPC 1.4(a); engaged in conduct prejudicial to the proper administration of justice, in violation of MCR 9.104(1); and engaged in conduct that exposes the legal profession or the court to obloquy, contempt, censure or reproach, in violation of MCR 9.104(2), as charged in paragraphs 41(a), (e), (g) and (h) of the formal complaint.
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> Furthermore, the hearing panel finds that the Grievance Administrator did not establish any of the violations alleged in Count Two. As such, Count Two of the formal complaint should be dismissed in its entirety. [Misconduct Report, 10/11/18, p 6.]

The parties next appeared before the panel for a sanction hearing on January 22, 2019. On June 5, 2019, the panel's sanction report was issued. With regard to sanction, the panel found the following:

> [W]e find that a suspension of respondent's license to practice law is appropriate not only under ABA Standard 4.42(a) and (b), as argued by the Administrator's counsel, but also under ABA Standard 4.62, which states "suspension is generally appropriate when a lawyer knowingly deceives a client, and causes injury or potential injury to the client." We do so given our finding that respondent failed to explain to Mr. Musaed why he felt it necessary to dismiss his case, without Mr. Musaed's prior knowledge and consent, and the cost issue that resulted from that dismissal, which was also not sufficiently explained to Mr. Musaed. After considering all of the above, the panel will order that respondent's license to practice law in Michigan be suspended for 60 days. [Sanction Report, 6/5/19, pp 3-4.]

II. Discussion

A. The hearing panel did not impose discipline for misconduct that was either not charged in the formal complaint or lacked evidentiary support in the record.

On review, respondent argues that he has been "disciplined in the absence of charges of misconduct set forth in the formal complaint or where claims of misconduct have no evidentiary support in the record." (Respondent's Brief in Support, p 4.) In particular, respondent argues that the panel has failed to articulate how respondent's preparation was inadequate, and what exactly constituted neglect in his handling of Mr. Musaed's matter to support their finding that respondent violated MRPC 1.1(b) and (c), and 1.3.

When a hearing panel's findings are challenged on review, the Board must determine whether the panel's findings of fact have "proper evidentiary support on the whole record." *Grievance Administrator v August*, 438 Mich 296, 304 (1991). See *also Grievance Administrator v T. Patrick Freydl*, 96-193-GA (ADB 1998). "This standard is akin to the clearly erroneous standard [appellate courts] use in reviewing a trial court's findings of fact in civil proceedings." *Grievance Administrator v Lopatin*, 462 Mich 248 n 12 (2000) (citing MCR 2.613(C)). Under the clearly erroneous standard, a reviewing court cannot reverse if the trial court's view of the evidence is plausible. *Thames v Thames*, 191 Mich App 299, 301-302 (1991), lv den 439 Mich 897 (1991).

Respondent claims that "this case is really about a secretary's unintentional sending a deposition notice to the wrong address." For had that not occurred, respondent argues he would not have been subject to a formal disciplinary action:

> [T]he subsequent deposition of Musaed's physician would not have been voided; there would not have been a need for an adjournment of trial; a voluntary dismissal would not have been necessary; the filing of a new complaint would not have been required; there would not have been costs imposed upon Musaed by the trial judge; and there would not have been an involuntary dismissal. [Respondent's Brief in Support, p 6.]

The facts, however, belie this view of what occurred with Mr. Musaed's matter. This matter did not simply hinge on whether a secretary correctly mailed a notice of a deposition. After Mr. Musaed rejected the case evaluation award, respondent had four months to prepare for trial. However, it was not until three weeks before trial that respondent scheduled the depositions of two

necessary expert witnesses, Dr. Nabil Suliman and nurse Kim Gray.[3]

Respondent stipulated to the dismissal of Mr. Musaed's matter only after his attempts to get the trial adjourned and to have another attorney take over the matter were unsuccessful. Respondent testified that he sought dismissal "because trial was in two days or so. We didn't have a deposition to prove our case. So in my - I mean, I thought in my professional opinion that would have been the way to go. Preserving some benefits for the client if we refiled." (Tr 6/5/18, pp 125-126.) The panel also took note of respondent's explanation in this regard:

> Respondent attempted to explain why Mr. Musaed's case was ultimately dismissed. During the litigation, respondent scheduled the de bene esse deposition of Mr. Musaed's physician. However, because the notice was unintentionally sent to an old address, opposing counsel was not aware of the deposition and did not attend. (Tr, p 145; Petitioner's Exhibit 9, p 9.) As a result, on June 1, 2012, the trial court ordered the continuation of the physician's deposition, to allow opposing counsel the opportunity to cross examine the physician. The deposition was required to take place "prior to the commencement of trial," which was scheduled for June 6, 2012. (Petitioner's Exhibit 11; Tr, p 128.) Respondent claims the physician was unavailable at that time, so his only choice was "to go to trial and lose or agree to a dismissal under the most favorable terms to Mr. Musaed which would - which was dismissal without prejudice." (Tr, p 129.) Misconduct Report, 10/11/18, pp 4-5.]

The facts appear clear to us; respondent only stipulated to dismiss the case because he was unprepared for trial. He had plenty of time to prepare but chose not to do so. We find that there is more than ample evidentiary support for the hearing panel's findings that respondent was inadequately prepared, failed to act with reasonable diligence and promptness, and neglected Mr. Musaed's matter, in violation of MRPC 1.1(b) and (c), and 1.3.

We make the same finding with regard to the hearing panel's findings that respondent failed to communicate with Mr. Musaed to the extent necessary to allow him to make informed decisions regarding his representation, in violation of MRPC 1.4(b). In his answer to the formal complaint, respondent admitted that he stipulated to the voluntary dismissal of Mr. Musaed's complaint, that any refiling would be on the payment of costs to State Farm, and that he did not advise Mr. Musaed of the same. (Respondent's Answer, ¶¶ 27-29.) However, he denied that he did not tell Mr. Musaed

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[3] Nurse Gray's deposition was actually scheduled for two days *after* trial was to begin.

of the order to pay costs or the eventual dismissal after respondent refiled the case. (Respondent's Answer ¶ 34.)

Mr. Musaed testified much differently. He testified that respondent repeatedly told him that "everything is fine," and that he was never told that his case had been dismissed. In fact, he testified that the first time he learned of the dismissal of his case was when he met with the Grievance Administrator's counsel after filing his request for investigation against respondent. (Tr 6/5/18, pp 38, 45, 48.) Respondent argued that the fact that Mr. Musaed signed an affidavit of indigence, (Petitioner's Exhibit 14), seeking a waiver of the costs ordered to be paid, shows that Mr. Musaed knew his case had been dismissed and that costs would have to be paid to State Farm if the matter was refiled. This ignores the fact that there was a language barrier between respondent and Mr. Musaed, who needed a translator at the hearing, and that Mr. Musaed testified that he simply signed what respondent told him to sign because he trusted him. (Tr 6/5/18, pp 62-64.)

The hearing panel appears to have found Mr. Musaed's testimony to be credible. "Deference is given to the special opportunity of the trial court to judge the credibility of witnesses. MCR 2.613(C)." *Thames v Thames*, 191 Mich App 299,301-302 (1991). Because the hearing panel has the opportunity to observe the witnesses during their testimony, the Board defers to the panel's assessment of their demeanor and credibility. *Grievance Administrator v Neil C. Szabo*, 96-228-GA (ADB 1998); *Grievance Administrator v Deborah C. Lynch*, No 96-96-GA (ADB 1997). We find no reason to refrain from exercising such deference here.

Respondent argues that the panel failed to articulate "genuine professional misconduct" to support a finding that respondent violated MCR 9.104(3).[4] However, it is clear to us that the hearing panel's finding that respondent violated MCR 9.104(3) is tied to the finding that respondent violated MRPC 1.4(b). The hearing panel was extremely troubled by respondent's actions in stipulating to the dismissal of Mr. Musaed's case and to the payment of costs. More so, why respondent believed it was his client's responsibility to pay the costs rather than his own.[5] (Tr 1/22/19, pp 46-47.) At the sanction hearing, the following question was asked by the Chairperson:

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[4] MCR 9.104(3) states: that it is grounds for discipline if an attorney engages in "conduct that is contrary to justice, ethics, honesty, or good morals."

[5] Respondent argues that he was not required to pay the costs and had he done so, he risked being in violation of MRPC 1.8(e) by providing financial assistance to his client. However, here, costs were only ordered because respondent stipulated to the payment of costs to State Farm if he tried to refile the case. Arguably, payment of costs under these particular circumstances would not be considered as providing financial assistance to a client as articulated in MRPC 1.8(e).

> CHAIRMAN ACKER: . . . wouldn't the commentary be what did the client do wrong in the case getting dismissed and the answer I think is nothing. What did [respondent] do to get the case dismissed? I think the answer was everything. The question is then why was it the client's responsibility to spend the $7,400 to save his own case when he didn't do anything wrong?
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> MR. SCHWARTZ: That's not the question.
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> CHAIRMAN ACKER: That was my question, sir.
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> MR. SCHWARTZ: I understand. But that's not really the question before us.
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> CHAIRMAN ACKER: Some of us think it is. (Tr 1/22/19, pp 46-47.)

Both the Administrator's counsel and the panel also noted the court's exasperation with respondent during the underlying proceedings:

> Respondent testified that he informed Mr. Musaed about the dismissal and, although costs would be assessed by the court, respondent believed he could get the costs waived because Mr. Musaed was indigent. (Tr, p 130.) However, respondent's motion to waive costs was denied by the court:
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> THE COURT: Okay. Plaintiff counsel's rendition of the facts is pure fiction. Mr. Friedman agreed to this trial date at least three months before I set the trial date. Now Mr. Friedman doesn't really like to try cases. And so when he saw that he couldn't get this case settled, he scrambled around and tried to get an attorney to cover the case for him. But the attorney wouldn't come in because it was so late. Or he told Mr. Friedman I don't have enough time to prepare for this case.
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> And so - in addition, this issue about Dr. Suliman's deposition, that was also the Plaintiff's fault too because it wasn't properly noticed. And so, because Mr. Friedman didn't want to try the case, he got the client to agree to a voluntary dismissal.
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> I absolutely intend on assessing the costs against the Plaintiff if this case is refiled. There's been no showing of indigency.
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> THE COURT: You know, what really kills me about this is this was a date that was agreed to. I set aside the time. And if the Plaintiff

> can't pay it, if Mr. Friedman wants this case reinstated, then he's going to pay the costs. [Petitioner's Exhibit 15; Misconduct Report, 10/11/18, p 5.]
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> * * *
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> THE COURT: I am so unhappy with Mr. Friedman, that he should have been here. He's afraid to come here on this matter.
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> MS. SAFIE: He's actually -
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> THE COURT: Because he knows that I'm going to lay into him. Because I am so totally unhappy with him in this case. I mean, he seems to ignore what happened here, Miss Safie. And I believe you were even involved to a certain extent.
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> MS. SAFIE: I wasn't even employed with this firm.
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> THE COURT: Okay. In any event, what happened in this matter was it was set for trial, on a trial date that Mr. Friedman agreed upon, and then Mr. Friedman decided to take a vacation. Mr. Friedman doesn't really like to try cases. He tried to get another attorney to take over late in the game. The other attorney wouldn't do it. And so, Mr. Friedman's response to this, Miss Safie, was to enter a voluntary dismissal, which the court rule says that if you do that, if you want to reinstate the case, and he does because he wants to assert the same claims and more now, then it's up to me whether you're going to pay costs. And he is absolutely going to pay costs on this case. I had nothing to do. Mr. Smith had nothing to do. We were both absolutely ready and prepared to try this case. And Mr. Friedman pulled the rug out from under us by doing what he did.
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> In addition, I find it almost laughable that he argues that I shouldn't make the Plaintiff pay these costs because he doesn't have the money. Well, then you know what, Mr. Friedman, in my judgment, should pay the costs. If his client doesn't have it -- this was all caused by Mr. Friedman. I was totally unhappy with him. He should have been here today. And I'm going to require the costs to be paid for the reasons I've indicated. And if he's unhappy about that, and his client can't pay them, he should pay them. [Misconduct Report, 10/11/18, p 5; Petitioner's Exhibit 17, pp 5-6.]

We find that there is sufficient evidence to support the hearing panel's finding that respondent's conduct violated MCR 9.104(3).

Respondent next argues that because he assigned aspects of Mr. Musaed's case to subordinates or independent contractors, that he can only be liable for failing to supervise those persons, a charge that was not set forth in the formal complaint.[6] However, this position fails to recognize that respondent was the attorney of record in Mr. Musaed's matter, regardless who he delegated certain aspects of the case to. As noted by the Administrator, respondent signed the complaint; he sent the letter to Mr. Musaed regarding the case evaluation; he filed the witness list; he noticed the depositions of Dr. Suliman and nurse Gray; he contacted attorney Lyle Harris to take over the case shortly before trial; he stipulated to the dismissal of the case with costs; and he subsequently refiled the matter on two occasions. Respondent should not be excused from his own dilatory conduct simply because certain aspects of the case were delegated to others to handle. This argument is simply without merit. Respondent was not disciplined for conduct that was not charged in the formal complaint.

B. The hearing panel did not improperly utilize the suspension standards found in ABA Standards 4.62 and 4.42(a) and (b) and did not err in imposing a 60-day suspension.

Finally, on review, respondent argues that the panel applied the wrong ABA Standards, 4.62 and 4.42, in determining that a suspension of respondent's license was required. The panel found that:

> [A] suspension of respondent's license to practice law is appropriate not only under ABA Standard 4.42(a) and (b), as argued by the Administrator's counsel, but also under ABA Standard 4.62, which states "suspension is generally appropriate when a lawyer knowingly deceives a client, and causes injury or potential injury to the client." We do so given our finding that respondent failed to explain to Mr. Musaed why he felt it necessary to dismiss his case, without Mr. Musaed's prior knowledge and consent, and the cost issue that resulted from that dismissal, which was also not sufficiently explained to Mr. Musaed. [Sanction Report, 6/5/19, pp 3-4.]

Respondent argues that it was improper for the panel to apply ABA Standard 4.62, because the formal complaint did not allege that respondent's conduct was knowingly deceptive. We find that it was not necessary that it do so. Respondent admitted that he stipulated to the dismissal of his

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[6] Respondent had five separate attorneys attend various hearings that occurred in Mr. Musaed's matter.

client's case and to the payment of costs if refiled, without his client's knowledge or consent, in the mistaken hope that he could simply refile the case, and obtain a waiver of the costs by claiming that his client was indigent. Respondent's conduct in this regard was deceptive.

Respondent makes the same argument with regard to the panel's reliance on the suspension standard found in ABA Standard 4.42; the formal complaint does not allege that respondent knowingly failed to perform services. Again, respondent spins his actions as those taken to "protect his client," ignoring the fact that his client was placed in such a precarious position solely because of his knowing failure to adequately prepare for trial. That conduct, coupled with the troubling pattern from respondent's prior admonishments,[7] noted by the Administrator's counsel at the sanction hearing, (Tr 1/22/19, p 21), supports the panel's consideration of the suspension standard found in ABA Standard 4.42. While the Board possesses a greater degree of discretion on review with regard to the sanction imposed by a hearing panel, we also afford a certain level of deference to a hearing panel's subjective judgment on the level of discipline. Here, the panel applied the appropriate ABA Standards for the misconduct found, and appropriately determined that a suspension was required. Therefore, we find it appropriate to afford such deference to the panel's findings regarding level of discipline.

III. Conclusion

For the reasons discussed above, we conclude that the hearing panel's findings of misconduct have proper evidentiary support in the record and that the 60-day suspension of respondent's license is the appropriate sanction to impose in this matter. Thus, we will enter an order affirming the hearing panel's order of suspension.

Board members Jonathan E. Lauderbach, Michael B. Rizik, Jr., Barbara Williams Forney, James A. Fink, Karen O'Donoghue, and Anna Frushour, concur in this decision.

Board members John W. Inhulsen and Linda Hotchkiss, MD were absent and did not participate.

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[7] A troubling pattern of failing to adequately communicate with clients to allow them to make informed decisions regarding their matters. (Petitioner's Exhibits 30, 31, 33, and 34.)