STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellant-Cross Appellee,

v

John J. Devine, Jr., P 12724,

Respondent/Appellee-Cross Appellant,

Case No 11-20-GA.

Decided: December 14, 2012

Appearances:

Stephen P. Vella, for the Grievance Administrator
John J. Devine, Jr., Respondent, In Pro Per

BOARD OPINION

Respondent represented a divorced lottery winner in postjudgment proceedings by her ex-husband who sought a greater share of the lottery winnings than had been previously distributed to him pursuant to the divorce judgment. Respondent was given $10,500 from his client to hold in trust in order to facilitate settlement with her ex-husband (and for fees). Respondent notified opposing counsel, on various occasions, that he held these funds, which "represent[ed]" or "approximate[d]" the ex-husband's traditional "share" of the lottery proceeds, and that the matter could be resolved upon acceptance of the sum in satisfaction of the claim. Ultimately, the terms of the offer by respondent's client were not accepted and respondent returned the money (minus respondent's fees) to his client upon her request. The formal complaint alleges that respondent violated the trust accounting rule by not turning over the funds to the ex-husband or keeping the funds until a dispute as to the ex-husband's claim to the funds had been resolved. A second count alleges failure to cooperate with the investigation. The hearing panel dismissed the matter, finding that neither count had been established by the evidence. The Administrator has petitioned for review. Respondent petitioned for cross-review, arguing that the panel erred in failing to impose sanctions against the Attorney Grievance Commission and/or its counsel. We affirm.

Respondent's client, Anne J. Sigsbee, won $1 Million in the State of Michigan's lottery in 1984. She and her husband, Daniel L. Sigsbee, were divorced in April, 1997. The judgment of divorce provided for an even split of the lottery payments after taxes and setoffs for medical insurance and Social Security benefits. The complaint further alleges that, on November 4, 2003, Mr. Sigsbee filed a motion to clarify and/or modify the judgment of divorce, seeking an additional share of the proceeds to be received in 2004 (the final installment) and for previous years during which Ms. Sigsbee had been provided medical benefits through an employer. Ms. Sigsbee retained respondent. The final lottery check was dated February 13, 2004 and was in the amount of $34,425. Under the original terms of the divorce, Ms. Sigsbee would have owed Mr. Sigsbee $9,812.50 as his share of the 2004 lottery proceeds.

The hearing panel's report states:

> On February 16, 2004, Anne Sigsbee wrote a check to the Respondent in the amount of $10,500, which he placed in his Trust Account. The testimony established, without contradiction, that the check that Anne Sigsbee wrote to Respondent was from funds contained in a joint account held by Anne Sigsbee and her sister, Marian Irish, in the Chemical Bank and Trust Company (Copy attached to Respondent's Answer to Complaint as Exhibit "A"). The testimony showed that this joint account had existed for many years, and at one time had involved other family members. While the Grievance Administrator charged and vigorously argued that these funds, received by Mr. Devine, were "lottery proceeds," or a portion of the "lottery proceeds," no substantive evidence was presented establishing this as a fact and no proofs were presented that the Lottery check itself was ever given to Mr. Devine. In fact, the undisputed testimony shows that Mr. Devine believed that the monies he received were his client's funds, that he was holding these funds for her benefit in trying to effectuate a quick settlement, and at no time did he believe that he was holding these monies for the benefit of Mr. Sigsbee. [HP Report, p 5.]

The hearing panel's report continues, discussing various additional details regarding the proofs at the hearing. Much of the evidence centered on letters and statements by respondent which, the Administrator argues, support the contention that respondent actually had in his possession a portion (Mr. Sigsbee's portion) of the lottery proceeds. The panel disposed of these contentions regarding respondent's meaning:

> Respondent Devine testified that he never intended to represent to either [opposing counsel] that he was holding any monies for the benefit of Mr. Sigsbee, and, in fact, his letters did not say that he was. He did represent that he had $9,812.50 in his account which would be paid to Mr. Sigsbee if a "global settlement" could be reached in seven days, but he also testified that he was not aware until these AGC proceedings were commenced that anyone had construed his letter to mean that he was holding monies for Mr. Sigsbee or that he would do so after the seven day deadline stated in his letter of February 16, 2004. He further testified that neither Ms. Sessoms or Ms. Bolles ever said to him that they were relying on their belief that he was holding monies that belonged to Mr. Sigsbee. [HP Report, p 7.]

The report then notes that Ms. Sigsbee demanded her money back and respondent returned the money to her on August 28, 2004.

The Administrator argues that the panel erred in dismissing Count One of the formal complaint which alleges a violation of MRPC 1.15's provisions requiring a lawyer to (1) promptly pay any funds a third person is entitled to receive,[1] and (2) keep separate property in which two or more persons claim an interest until the dispute is resolved.[2]

There is a significant difference between funds a "third person is entitled to receive"[3] and funds of a client who may owe a debt to a third party. Respondent argues, and the panel agreed, that the funds in respondent's possession were not shown to be anything other than sums deposited with him by his client to facilitate settlement. While an opposing party may have a contractual, judgment-based, or other claim against respondent's *client* for payment, this is different than having a claim to certain property or funds. As Michigan Ethics Opinion R-7 states, in part: "A generalized third party interest in disputed funds without more does not justify a lawyer's refusal to obey client instructions as to the fund disposition."[4]

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[1] See MRPC 1.15(b)(3).

[2] See MRPC 1.15(c).

[3] MRPC 1.15(b)(3). See, for example, Michigan Ethics Opinion R-61, positing a situation where the Friend of the Court had a lien against the proceeds of a client's personal injury case and the lawyer had been informed of the lien.

[4] Michigan Ethics Opinion R-7, quoting Hazard & Hodes, *The Law of Lawyering* (1989), pp 283-284.

The current edition of the treatise relied upon in Opinion R-7 states:

> [A] most difficult situation arises under Model Rule 1.15(b) when both a client and a third party claim an interest in funds being held by a lawyer. A common example is where the proceeds from an insurance settlement in a personal injury case are intended to pay outstanding medical and hospital bills, as well as recompense the client. . . .
>
> A lawyer does not stand as a neutral observer between his client and third party claimants, however, and must favor the client where the other party's claims are not solid. For example, the mere fact that a third party is a creditor of the client and "expects" funds held by the lawyer to be the source of payment is insufficient to justify a lawyer's refusal to obey the instructions of her client to turn over the entire amount.
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> The Comment to Rule 1.15 uses the phrases "just claims" and "duty under applicable law" to suggest that the third party must have a matured legal or equitable claim in order to trigger the lawyer's duty to hold the funds apart from either claimant, pending resolution of the dispute. Similarly, if a lawyer has undertaken to become the equivalent of an escrow agent as between the client and the third party, that should also be sufficient. Restatement of the Law Governing Lawyers §45, Comment d is to like effect:
>
> > *If a lawyer holds property belonging to one person and a second person has a contractual or similar claim against that person but does not claim to own the property or have a security interest on it, the lawyer is free to deliver the property to the person to whom it belongs.*
>
> [1 Hazard, Hodes & Jarvis, *The Law of Lawyering* (3rd ed), §19.6 Emphasis added.]

The hearing panel found that the Administrator had not met his burden of proving the allegations in Count One. We review a hearing panel's factual findings for "proper evidentiary support on the whole record." *Grievance Administrator v Lopatin*, 462 Mich 235, 247-248 n 12; 612 NW2d 120 (2000). The panel's findings as to Count One have proper evidentiary support in the record, and we therefore find no basis to disturb the dismissal of that count.

Petitioner also argues that the panel erred in dismissing Count Two, which alleged a violation of MRPC 8.1(a)(2) (requiring a lawyer to respond to a lawful demand for information in connection with a disciplinary matter). The panel granted respondent's motion for involuntary dismissal on the last day of hearing, and explained in its report that, although "acrimony" developed between counsel for the petitioner and respondent, the record showed that no violation of the rule had been established. We find no basis to overturn the panel's finding in this regard.

Finally, respondent filed a cross-petition for review arguing that "the panel erred as a matter of fact and law in its decision by failing to award sanctions to Respondent." This claim was not preserved below and respondent has not otherwise established that an award of sanctions is appropriate.

For all of the foregoing reasons, we will enter an order affirming the hearing panel's order of dismissal in this matter.

Board members James M. Cameron, Jr., Rosalind E. Griffin, M.D., Andrea L. Solak, Carl E. Ver Beek, Sylvia P. Whitmer, Ph. D., Lawrence G. Campbell, and Dulce M. Fuller concur in this decision.

Board Chairperson Thomas G. Kienbaum and Board Member Craig H. Lubben were absent and did not participate.