GRIEVANCE ADMINISTRATOR,
Petitioner/Appellee,
v
MURDOCH HERTZOG, P-14913,
Respondent/Appellant.

File No. DP 112/86

Decided: December 6, 1988

BOARD OPINION

The Complainant, Bradford Gagne, and the Respondent, Murdoch Hertzog, have each petitioned the Board for review of a hearing panel order suspending respondent's license for sixty days. Upon consideration of the whole record, the briefs and arguments of the parties, the findings and conclusions of the hearing panel in regard to the findings of misconduct as alleged in Counts I, III and V of the complaint and the dismissal of Counts II and IV are affirmed. The discipline imposed by the hearing panel is modified by reducing the sixty-day suspension to a suspension of thirty days. The complainant's request for restitution is denied.

Respondent Hertzog was retained in January 1981 by Bradford Gagne to pursue a fire insurance claim against Group Insurance Company. At the time of the fire, September 1980, Mr. Gagne had commenced a divorce action. Respondent filed suit against the insurance company in the name of both Mr. and Mrs. Gagne in September 1981. Although he was not involved in the divorce action which had already been commenced, he was aware of it. He did not discuss the filing of the insurance case with Mrs. Gagne or her divorce attorney. Later that month, Gagne retained Hertzog to substitute in as his counsel in the divorce case. Custody of the minor child was apparently the primary issue in the divorce case but there were also claims regarding division of the marital assets including the fire insurance proceeds. Count I of the complaint is based upon charges of conflict of interest resulting from respondent's simultaneous representation of Gagne in the divorce case while representing both husband and wife in the claim against the insurance company.

The divorce case was tried in 1982. Count II of the complaint charged that the respondent failed to introduce a number of receipts given to him by Gagne for reimbursement of some $14,000 in miscellaneous repairs to the home. The panel declined to find misconduct for the reason that the Administrator had failed to establish that Hertzog's failure to introduce the receipts was unacceptable negligence as opposed to reasonable trial strategy.

A divorce judgment was eventually entered giving custody to Mr. Gagne and dividing the marital estate. An appeal of that judgment was filed and Gagne specifically directed that respondent request oral arguments. The panel found that respondent's failure to make the oral argument was inadvertent and not misconduct. With

regard to a further allegation in Count III of the complaint that Hertzog falsely represented to his client that the case had in fact had been argued, the panel found that while he did not directly lie to his client about the events at the Court of Appeals, respondent was not entirely candid with his client and left him with the impression that the appeal had been argued. The complaint further charged in Count IV that respondent was untruthful in certain representations made to the Attorney Grievance Commission and to the Supreme Court in response to a Complaint for Mandamus filed by Gagne. While certain portions of respondent's statements were found to be vague, the panel could not conclude that the statements were deliberately false.

Respondent was discharged by Gagne as his attorney in July 1984 and was requested to release Gagne's files to substitute counsel. Respondent refused to release the files and Gagne filed a Request for Investigation in November 1984. The Attorney Grievance Commission admonished Hertzog but the insurance file was not released until June 1985. The hearing panel ruled that respondent did not have a right to retain the file on condition that his client execute a full release from all liability and that his conduct as alleged in Count V of the complaint constituted a violation of Canon 6 of the Code of Professional Responsibility, DR 6-102(A).

The hearing panel's report in this case is based upon their first-hand opportunity to observe both the respondent and the complainant as well as six other witnesses called by the parties, their examination of more than thirty exhibits, and their review of the trial transcript of 294 pages. The Board's review of the panel's findings is not conducted on a de novo basis and those findings should be affirmed where they have proper evidentiary support in the whole record. In Re Del Rio, 407 Mich 386; 285 NW2d 277 (1979). While both the respondent and the complainant have argued forcefully that the testimony of the other should be discounted, we must stress that the hearing panel members had a far better opportunity than the members of this Board to observe every person called upon to give sworn testimony. Having had that opportunity to judge credibility, the hearing panel's findings of fact should be given deference whenever possible, see Matter of David N. Walsh, File No. DP 16/83 (Brd. Opn 8/16/84, p. 333).

The panel's finding of a conflict of interest as alleged in Count I is primarily a question of law. Respondent Hertzog admits that he represented both Bradford and Sandra Gagne in the insurance case while simultaneously representing Mr. Gagne in the divorce action. However, he claims that there are circumstances in which such representation is permissible. Respondent further argued that both husband and wife were interested in getting the greatest possible recovery from the insurance company and that the subsequent division of those proceeds could have been handled later in the divorce case. Canon 5 of the Code of Professional Responsibility, DR 5-105(C) states that a lawyer may represent multiple clients "if each consents to the representation after full

disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of both." The panel correctly noted that Mr. Hertzog filed suit in Mrs. Gagne's name without speaking directly to her or her divorce attorney. Under those circumstances, it cannot be said that he obtained her consent as required. While he did eventually withdraw from the insurance case, it was more than one year after the suit was filed and after the divorce trial in which division of the insurance proceeds was an issue. The panel appropriately deemed respondent's conduct to be in violation of Canon 5 and MCR 9.104(1-4).

Similarly, resolution of Count V involves primarily legal rather than factual issues. Although respondent was discharged by Gagne in July 1984, the insurance file requested by Gagne was not released until June 1985. Respondent does not dispute that there was a substantial delay and acknowledges seeking a document signed by Gagne releasing him from all claims. We agree with the panel that the demand for a release as a precondition to a return of the file was inconsistent with the requirements of Canon 6, DR 6-102(A) which directs that a lawyer shall not attempt to exonerate himself from or limit his liability to his client for his personal malpractice.

The Petition for Review filed in this case by the Complainant, Bradford Gagne, includes requests that the order of discipline be modified by ordering that respondent make restitution to include restoration of all attorney fees paid by Gagne in the divorce action and the subsequent appeal, restoration of the attorney fees paid with regard to the insurance fire loss and compensation to Gagne for expenses which, he alleges, were not properly introduced at the divorce trial. MCR 9.106(5) authorizes the hearing panel, the Board or the Supreme Court to require restitution as a condition of an order of discipline. This Board has previously discussed those conditions under which a restitutio award as authorized by that rule would be appropriate. Matter of Frederick A. Sauer, File No. DP 25/84 (Brd. Opn. 4/16/85, p. 359). In that case, the Board vacated that portion of a hearing panel order of discipline awarding restitution to the client of $7500 as the result of the respondent's failure to adequately advise his client of the status of the sale of a home. We believe that our observations in that case are applicable here.

> The Michigan Supreme Court, in its wisdom, allowed restitution as a discretionary adjunct to discipline. However, not every case, perhaps not most, involve circumstances and proofs which would make restitution appropriate. In the disciplinary forum, the calculation of reimbursable losses is fraught with difficulty . . .
>
> Certainly the rule amendment allowing restitution is useful and welcome and, in appropriate circumstances, may allow reimbursement to clients who would otherwise have to needlessly undergo further time and expense of a

> separate civil action. However, it is the opinion of the Board that restitution should only be considered in disciplinary cases where the respondent admits responsibility for the loss of a certain sum or the link between misconduct and a readily verifiable degree of loss is demonstrated without the need for lengthy proof or proceedings. In this case the question of restitution is better left to separate civil litigation. Matter of Sauer, supra, p. 360.

Finally, we have cited above the Board's responsibility to support the panel's findings when they are supported by the record. However, the Board has also been given broad authority to assess the appropriate level of discipline and must exercise its "overview function" with respect to the level of discipline. Matter of David N. Walsh, DP 16/83, (Brd. Opn. 8/16/84, p. 333, citing In Re Daggs, 411 Mich 304; 307 NW2d 66 (1981).

While we do not condone or excuse the professional misconduct found by the hearing panel, we believe that a suspension of thirty days, rather than the sixty-day suspension ordered by the hearing panel, is appropriate in this case. We specifically not respondent's prior unblemished record during his thirty-five years of practice.

Concurring: Martin M. Doctoroff, Remona A. Green, Hanley M. Gurwin, Robert S. Harrison and Theodore P. Zegouras.

DISSENTING OPINION

By Patrick J. Keating

I am in agreement with the majority's opinion that the factual findings of the hearing panel should be affirmed and that the complainant's request for restitution should not be granted by the Board in light of the availability of other, more appropriate, civil remedies.

I also agree that the Board should exercise its overview function with respect to the level of discipline. However, I believe a reprimand would be the appropriate discipline in this case.

This respondent has practiced law in Michigan for thirty-five years without disciplinary sanction. In determining whether the protection of the public, the courts and the legal profession warrants a suspension of an attorney's license to practice law, a prior unblemished record should be given considerable weight where, as in this case, the acts of misconduct arise from his or her relationship with a single client and do not evidence a more serious pattern of misconduct involving other clients. There is certainly some evidence in the record that the complainant in this case placed unusually high demands upon his lawyer and it is also clear from the record that Mr. Hertzog expended a considerable

amount of time and energy on his client's behalf. Like my colleagues, I do not mean to condone the respondent's lapses in his ethical obligations to his client but I see no reason to believe that a suspension is necessary to prevent similar conduct in the future by this attorney.