STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellee,

v

Carl Oosterhouse, P 35640,

Respondent/Appellant,

Case No. 07-93-GA

Decided: November 26, 2008

Appearances:

Dina P. Dajani, for Grievance Administrator, Petitioner/Appellee
Jon R. Muth, for the Respondent/Appellant

BOARD OPINION

The misconduct committed in this case was described by the hearing panel in its report:

> Respondent admitted to conversion, deceiving a client and intentional dishonesty. The conduct admitted included conversion of client funds, misappropriation of client and law firm funds, forgery, submission of invalid expense reports, inappropriate transfer of funds between client accounts, and failing to provide truthful statements when initially questioned about the inappropriate conduct.

The nature and extent of respondent's theft and fraud are not at issue in this review. Because of the respondent's admissions, and the stipulation of the parties, this matter moved directly to the discipline phase before the panel. Respondent argued that he should be placed on probation pursuant to MCR 9.121(C)(1). The panel found that respondent was not eligible for probation because he had failed to establish the existence of two prerequisites under this rule. Next, having considered recommended sanctions under the American Bar Association Standards for Imposing Lawyer Sanctions (ABA Standards), and aggravating and mitigating factors, the hearing panel determined that disbarment was the appropriate discipline in this matter and, therefore, entered an order revoking respondent's license to practice law. We affirm.

Respondent was a partner at Varnum, Riddering, Schmidt & Howlett LLP ("Varnum"). He joined the firm in 1983 and left in July, 2006 to go to the Grand Rapids office of another firm. He was a corporate lawyer with a substantial income and book of business. He was described in testimony at the hearing as a "superstar." His clients included the Gainey Corporation and its principal, Harvey K. Gainey, Sr. Respondent was active in the management of Varnum, serving as the Corporate Practice Chair and managing and developing the firm's consulting group. He was active in community organizations and on boards and, according to a 2003 evaluation, he managed many key relationships profitably and effectively. It was also represented to the panel that the personal fees billed and collected by respondent were the highest in the firm. The firm recognized this with a $60,000 bonus which, with similar bonuses in other years, brought his annual compensation from the late 1990's forward to a range scaling from $400,000 to in excess of $500,000. Records from 2005 also show that respondent was a successful rainmaker for his firm and had significant personal production and managed a very significant amount of legal work.

In 1986, respondent incorporated Covesco, Inc., which he characterized as a "shell company" and which functioned as respondent's alter ego, according to Varnum. Respondent admitted that prior to July 2006 he transferred to Covesco credits and trust account balances belonging to Gainey Corporation and Varnum. The amount of client credits and trust account proceeds transferred to Covesco were estimated to be in the range of $40,000 to $45,000 by Terrance Bacon, Varnum's general counsel.

Respondent also took money from his firm through fraudulent or improper expense reimbursement requests. He entered into an agreement, after a review of records with Mr. Bacon, in which he admitted that he was paid by Varnum for unjustified expense items based on Oosterhouse having falsely described the expenses as incurred for the benefit of clients or Varnum, and in which he admitted that the unjustified expenses requested by and paid to or for Oosterhouse over a ten year period likely fell within the range of $50,000 to $80,000.

The panel found that respondent engaged in "sophisticated manipulations of client invoices, credits on client fees that were diverted to Covesco, and other devices which hid [his] activities," citing, as one example, that respondent "carefully orchestrated the transfer of excess legal fees from flat fee assignments to the Covesco account, and then applied those credits to other lawyers' time so that they appeared to perform statistically at a better level."

Eleven witnesses testified at the hearing: respondent and his wife; Mr. Gainey; Varnum's General Counsel; respondent's reverend; three lawyers from Dickinson Wright, the firm respondent joined in 2006; and, three witnesses offered as experts on the questions pertinent to respondent's eligibility for probation.

On review, respondent argues that the panel erred in not placing respondent on probation. Specifically, respondent contends that the panel should have found that "during the period when the conduct which is the subject of the complaint occurred" respondent's "ability to practice law competently was materially impaired by physical or mental disability,"[1] and that such impairment "was the cause of or substantially contributed to that conduct."[2] Respondent also contends that disbarment is an inappropriate sanction under the ABA Standards and caselaw, and in light of the aims of the discipline system and considering mitigating factors.

Before we address respondent's arguments as to whether the panel erred in failing to grant respondent probation pursuant to MCR 9.121(C)(1),[3] we will enumerate that rule's requirements:

1. *Respondent* must demonstrate by a preponderance of the evidence that the rule's requirements have been met.
2. During the period when the conduct which is the subject of the complaint occurred, the lawyer's "ability to practice law competently" must have been

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[1] MCR 9.121(C)(a).

[2] MCR 9.121(C)(b).

[3] MCR 9.121(C) provides in part:

> (1) If, in response to a formal complaint filed under subrule 9.115(B), the respondent asserts in mitigation and thereafter demonstrates by a preponderance of the evidence that
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> (a) during the period when the conduct which is the subject of the complaint occurred, his or her ability to practice law competently was materially impaired by physical or mental disability or by drug or alcohol addiction,
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> (b) the impairment was the cause of or substantially contributed to that conduct,
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> (c) the cause of the impairment is susceptible to treatment, and
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> (d) he or she in good faith intends to undergo treatment, and submits a detailed plan for such treatment, the hearing panel, the board, or the Supreme Court may enter an order placing the respondent on probation for a specific period not to exceed 2 years if it specifically finds that an order of probation is not contrary to the public interest.

"materially impaired by physical or mental disability or by drug or alcohol addiction."

3. The impairment must have been "the cause of" or must have "substantially contributed to that conduct."
4. The cause of the impairment must be susceptible to treatment.
5. The lawyer must have a good faith intention to undergo treatment and must submit a detailed plan for such treatment.
6. A specific finding that "an order of probation is not contrary to the public interest" must be made.
7. Finally, the grant or denial of probation is discretionary: "the hearing panel, the board, or the Supreme Court *may* enter an order placing the respondent on probation for a specific period not to exceed 2 years if it [finds that such is not contrary to the public interest]."

Respondent argues that the hearing panel ignored evidence of impairment and causation and "punished [respondent] for his illness." As noted above, the panel heard testimony from three witnesses with experience relating to mental impairments. Martha Burkett, Program Administrator for the State Bar's Lawyers and Judges Assistance Program (LJAP) testified that respondent called the hotline on October 9, 2006. He entered into a contract with LJAP. She meets with him once a month to go over compliance and his relationships and other issues in his life; it is "just a kind of status check." *Id.* During the course of the hearing, respondent introduced evidence that he suffered from depression, attention deficit disorder, sleep apnea, and personality disorders with schizoid, depressive and avoidant features. Ms. Burkett testified that "this constellation of circumstances certainly could cause impairment." She also testified that she could not definitively say that any impairment experienced by respondent caused the misconduct here, but that "there are a number of factors, and certainly the mental health issues are a primary factor, I believe, in the decisions that he made." On cross-examination by the Grievance Administrator, Ms. Burkett was asked various questions about the nature of respondent's conditions or impairments, including this one: "Q. Once he left the law firm he was unhappy with and stole money from and joined another law firm, his abnormal behavior went away or ceased? A. Evidently it did." (Tr 10/10/07, p 288).

Molly Raaymakers, a neurofeedback specialist and limited license psychologist, testified that she first saw respondent a year after the behavior at issue in this case had ceased. Her testimony covered, among other things, the effects of sleep deprivation on the frontal lobe of the brain, brought on, in this case, she assumed by allergies and sleep apnea. It affects "emotional problem solving and decision making." Exhausted, the patient engages in critical and negative thinking. "It's not that they don't have abilities in there, it's just that they have so much baggage in electrical activity, it's kind of like having your fishing waders on and you're stuck in the mud." (Tr 12/18/07, p 32). Sleep deprived people "perform selectively" in the "areas that are most critical for safety and survival." Memory is the first thing to go. One overlooks mundane activities. Some sleep apnea patients pick up a passive-aggressive nature for their coping skill. Ms. Raaymakers admitted that, "We mistake personality traits for actually [sic] coping mechanisms." (Tr 12/18/07, p 37).

Ms. Raaymakers' letter of October 9, 2007 to Dr. Don VanOstenberg chronicles symptoms including depression, impaired cognitive abilities, severe attention/focus difficulties, timeliness, feelings of helplessness and being overwhelmed, moments of "zoning out"and mental "fog." She reported that respondent's EEG "has displayed continued gains in stability and resilience over the course of training. He has nicely improved within normal ranges on slow-wave frequency amplitude, as well as emerging balance in amplitude activity within 21hz, high beta (23-38)Hz and Gamma (38-42)Hz." (Respondent's Exhibit 33). Ms. Raaymakers testified that as long as respondent continues to "train" she sees no risk that the behaviors that led to this proceeding will recur. The Grievance Administrator also cross-examined this witness about the causes of respondent's behavior and other related matters.

Respondent also called as a witness his treating psychologist, Dr. Don VanOstenberg who has a bachelor's degree in psychology from Calvin College, a masters in vocational rehabilitation from Michigan State University and a PhD in counseling psychology also from MSU. He spends over fifty percent of his time doing "corporate consultations with a focus on helping people hire the right people," and spends about five or ten percent of his time doing psychotherapy. The rest of the time is spent "working with lawyers on various types of lawsuits. He does evaluations related to Social Security, Worker's Compensation, personal injury lawsuits," and has testified "hundreds of times," about half for plaintiffs and half for defendants.

Dr. VanOstenberg's extensive testimony covered respondent's upbringing, in which performance was emphasized, his personality disorder, which, it was said, left respondent unable

to form close relationships and focus on the performance of others in his firm, and respondent's other conditions. Dr. VanOstenberg expanded on respondent's condition and the causes for it:

> He'll jump from things – like they'll be doing dishes and he won't even complete drying the dishes and he's off on something else.
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> So the attention deficit disorder, the underlying depression, and the allergy, I think, combined with Carl's feelings of I don't know how to get close to people, people don't like me very much, dammit, they ought to perform better, and just alienated him in a tremendous way, so he stopped going to firm meetings or firm outings. When there was a family outing, he'd sit and play that Suduko, I think that is, that little numbers game. While everybody else was socializing, he'd sit and do that, because Carl doesn't know how to socialize, and he's very awkward when the relationship gets close. When he can play top lawyer, he knows how to do that, he's always known how to do that.
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> And I think that for those reasons he broomed a lot of details. I think that things that he let slide and he didn't know what to do with, if pushed on it, he couldn't bring himself to check on why there was a $50.00 entry that was unaccounted for, and eventually, to get heat off and get if off his desk, he broomed it into Covesco. That didn't seem to be his initial thought. He had Covesco as a shell corporation several years before he ever broomed something in it.
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> Q Does the behavior that you describe find some consistency with your diagnosis in terms of the depression, the ADD, the sleep problems, the other issues you've identified?
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> A It's consistent right down through all of those diagnoses, and they're additive. I think that's a crucial concept.
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> Having a sense of ethics and morality is part of a culture, and so for part of Carl's problems is that he didn't have the relationship skills to get fully invested in the culture at Varnum. He wound up being alienated from most people. He was somebody who harped on billings and good work and bonuses, and all of that kind of stuff. And I think if you're not part of a culture, that begins to get a fuzzy thing for you in terms of exactly what should you do with that particular issue. You lose the grand concept.
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> I think his brain fog that Molly described, which was due to the sleep apnea, allergy, and ADD, that compounded things and it created a problem.
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> I was thinking on the way down, a good example of that sort of issue is years ago, in the early years of psychiatry, it was thought to be beneficial to some of your female patients, because the psychiatrists were all males back then post Freud, to have sex with them if they were having a terrible sex life, you would kind of show them how to do it. It sounds abhorring [sic] to us now, but that was common back in the early 1900's. And gradually, that became not a good thing to do, but there was still a lot of hugging and sharing of affection with the idea that if the therapist would show the person how to do that, they then would transfer it to significant others.

> We have moved ultimately to the point now where if a therapist puts a hand on a female patient, they could have a problem. It's just tremendously different, but that's because our culture's different, very different than what it used to be back then.
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> So my point is that Carl didn't invest himself in the culture of Varnum enough to develop a really good sense of how things should be done there, in all of its details, all of its ramifications. So you had a lawyer who you could put on a big deal, but you better watch everything else related to that.
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> [Tr 12/18/07, pp 86-89.]

The questions whether respondent's competence to practice law was impaired and whether there was a causal nexus between any such impairment and the misconduct were put directly to Dr. VanOstenberg:

> Q Do you have an opinion as to the reasonable degree of psychological certainty whether the mental impairment that Carl had impaired his practice – or his ability to practice law competently in a general sense?
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> A Yes.
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> Q And if you would explain the basis for that conclusion.
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> A Well, I wouldn't see him being a generally competent lawyer if mainly what he can do is do the big deals and bring a lot of work in. He was wise enough to realize at least that there was a whole lot of things that he didn't do very competently, and he was in a firm where he could farm that out to the partners, and then he – he knows that he got to the point where he just could not sit in his office and do desk work, so things were left unattended for a long, long time. Apparently, not discovered before he left.
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> Q Do you have an opinion, to a reasonable degree of psychological certainty, whether the mental impairment that you have diagnosed caused and/or was a substantial contributing factor in his conduct that's at issue here?
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> A I believe it caused it.
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> Q And could you explain that, please?
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> A Well, I don't think if Carl hadn't had the upbringing that he did, leading to the personality disorders that he did, leading to the social dysfunction and the alienation of all intimacy, along with the ADD, the sleep apnea, the allergies, and finally depression, he would have been able to be a more complete attorney. I think we were dealing with somebody here who could only do part of practicing law, but because of the structure of the culture he was in, he could farm out everything else that drove him crazy, and that was good for everybody.
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> [Tr 12/18/07, pp 95-97.]

Dr. VanOstenberg also testified that "I don't think Carl ever saw it as stealing money. Carl saw it as an accounting problem." He concluded that respondent will never steal again for various reasons, and recommended that respondent meet with an ethicist.

The Administrator's cross-examination of Dr. VanOstenberg covered several areas, including how respondent could be bad with details related to accounting for client and firm funds and yet a very good corporate and bond lawyer, whether the witness had ever evaluated an attorney's competence to practice law (he didn't remember), his familiarity with MCR 9.121. Counsel for the Administrator also probed Dr. VanOstenberg 's knowledge of the misconduct, and went over Petitioner's Exhibits 6-8, some of the billing documents and disbursement requests by respondent that led to the generation of a refund check payable to a client whose signature was forged by respondent.

Also testifying was Thomas McNeill, the member of the Grand Rapids office of the Dickinson Wright firm who met respondent in 2001 and began recruiting him then. A member of the hearing panel asked Mr. McNeill the following question and received the following answer:

> MR. HOESCH: I have a question.
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> You referred to Carl as an excellent technical lawyer. What do you mean by technical?
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> A. From my standpoint, there's – I've had the misfortune of having to manage lawyers for seven or eight years. It's terrible. Some people are great client getters. Some people are terrific visionaries and problem-solvers. I think Carl is all of that. But on day-to-day lawyering, you know, roll up your sleeves and being a real lawyer and doing the documents and typing down the deal and making sure that your client's legal needs are met by the paper, Carl's super at that. He's super at the other as well, but he's super as that as well.
> [Tr 10/10/07, p 212.]

Another member of the Dickinson firm, Daniel Gosch, who tried to recruit respondent in 2004 and regarded him as competent to practice law then, testified that from his first day at Dickinson (in July 2006) respondent was "a practicing, solid-performing lawyer," and that he trusted him with his best client. Mr. Gosch further testified: "Carl's performance has been at every level that I would expect a lawyer to be, which involves such things as stewarding client funds and client relationships and law firm funds, and all of those things that we all do."

The record also contains memoranda or notations relative to Varnum's annual bonus program which provide a contemporaneous record of respondent's significant achievements at the firm in the areas of personal productivity, management, and client development from the early 1990's through 2005.

In reviewing a hearing panel decision, 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; 475 NW2d 256 (1991). "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 n12 (2000) (citing MCR 2.613(C)). Deference is given to the special opportunity of the trier of fact to judge the credibility of witnesses. MCR 2.613(C). See also *In re McWhorter*, 449 Mich 130, 136 n 7 (1995). "[I]t is not the Board's function to substitute its own judgment for that of the panels' or to offer a de novo analysis of the evidence." *Grievance Administrator v Carrie L. P. Gray*, 93-250-GA (ADB 1996), lv den 453 Mich 1216 (1996).

The primary thrust of respondent's arguments are that the panel ignored or afforded too little weight to certain evidence, particularly expert testimony. After a careful review of the whole record, we conclude that there is most certainly proper evidentiary support for the panel's findings. Respondent also argues that the panel held respondent to the wrong standard and required respondent's impairment to be the sole cause of his misconduct. Viewing the panel's report in its entirety, we find no merit to this claim. Clearly the panel understood the proper standard and quoted it in its report. Respondent further contends that the rejection of the expert testimony was flawed in part because it relied on an erroneous reading of Dr. VanOstenberg's testimony about his awareness of the scope of the misconduct. In the end, however, the panel, as trier of fact, was well within its right to reject the expert testimony offered in this hearing.[4] There are ample grounds to do so.

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[4] *People v Smith*, 425 Mich 98, 111 n 8 (1986), *People v Kanaan*, 278 Mich App 594, 620 (2008) (trier of fact is not bound to accept the opinion of an expert), People v Clark, 172 Mich App 1, 9 (1988) (same), *People v Oster*, 67 Mich App 490, 500 (1976) (rejecting argument that "opinion of an expert witness on the state of mind of a defendant claiming self-defense uncontradicted by other expert testimony must be accepted by the trier of fact as conclusive of the fact. Such is not and never has been the law."). See also, *In Re David H. Bernstein*, 966 So 2d 537, 544 (2007).

We agree with the panel's overall conclusion that respondent is not eligible for probation and concur in the panel's assessment that the theory that respondent viewed this as an "accounting problem" and "broomed details" is more than a little inconsistent with the high level at which he was performing. Accounting problems may be addressed by crediting a client's bill; theft is not the only option, and it is one lawyers can and must reject even if they are depressed, fatigued or beset by the entire host of problems plaguing this respondent. Fraudulently requesting from the firm accounting department a "return of balance" check for a client and then forging the client's endorsement seem like more than mere "details." Nor are we impressed with the notion that this case can be explained because respondent's personality disorder prevented him from becoming part of the Varnum culture of ethical and honest conduct. A disposition toward honesty does not depend on acceptance into a law firm culture in a person's mid-twenties, or, if it does, that might be referred to as a character flaw.

We do not doubt that respondent has suffered from physical and psychological conditions. However, probation is not appropriate in this case. Protection of the public is the paramount aim of the attorney discipline system. *Grievance Administrator v Rostash*, 457 Mich 289, 298; 577 NW2d 452 (1998). Despite the exceptional advocacy on respondent's behalf, we cannot agree that "[t]his case tests the ability of the attorney discipline system to deal intelligently and empathetically with mental illness." Rather, we think it tests the limits of the probation rule as applied to conduct that was plainly intentional and dishonest, and we perceive no error in the panel's finding that the requirements of MCR 9.121(C)(1)(a) and (b) were not established on this record.

The hearing panel correctly applied the American Bar Association Standards for Imposing Lawyer Sanctions, Standards 4.11 and 5.11. See, *Grievance Administrator v Frederick A. Petz*, 99-102-GA (ADB 2001), and *Grievance Administrator v Rodney Watts*, 05-151-GA (ADB 2007).

Accordingly, the hearing panel's order of revocation is affirmed.

William J. Danhof, Thomas G. Kienbaum, William L. Matthews, George H. Lennon, Andrea L. Solak, and Rosalind E. Griffin, M.D., concur in this decision.

Separate concurring statement of Thomas G. Kienbaum:

> I concur in my colleagues' disposition of this matter for the reasons stated in the opinion, but would add the following, independently dispositive, reason for affirmance: In my view, MCR 9.121(C) has no application to the instant case. That

rule permits a respondent to assert in mitigation and therefore demonstrate by a preponderance of the evidence that, among other things,

> . . . during the period when the conduct which is the subject of the complaint occurred, his or her ability to practice law competently was materially impaired by physical or mental disability or by drug or alcohol addiction . . . (Emphasis added) MCR 9.121(C)(1)(A).

There is, I believe, a clear distinction to be drawn between one's ability to practice law "competently" and one's willingness to practice law or conduct one's private life honestly. On its face, MCR 9.121(C) appears to apply only to misconduct that falls in the first category.

Imagine a lawyer convicted of robbing a bank. What conceivable relevance would that lawyer's competence or lack of competence to practice law have to do with the system's response to his conviction? In my view none, and inviting the bank robbing lawyer to argue that he is also an incompetent lawyer so as to perhaps lessen the system's response to his criminal activity makes no sense. Arguing that someone who commits a serious criminal act inevitably impairs his "ability to practice law competently," as respondent was forced to do in this instance, is circular.

I do not believe that the framers of MCR 9.121(C) intended it to apply to a case involving theft and fraud[1] - the equivalent of felony level criminal conduct - as opposed to practice related conduct, including carelessness with a client's property.

The predecessor to our current probation rule, GCR 1963, 970.3, became effective February 3, 1981. In what may have been one of the first cases considered by the Attorney Discipline Board regarding the availability of probation under that rule, the Board adopted the report of a Master that an attorney who had, among other things, misappropriated $11,000 from a decedent's estate should be eligible for probation. In that case, *Matter of Hugh J. McGuire*, File DP 146/81 (ADB 1983), the Board stated:

> The decision to grant probation is a discretionary one and the rule does not preclude any class or type of misconduct. We conclude based on the record before us that respondent is a candidate for probation as contemplated by GCR 970.3.
> [*McGuire, supra*, p 3.]

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[1] MCR 9.121(C)(1) also limits its application to cases where a "formal complaint [was] filed under sub-rule 9.115(B)," and does not include matters commenced under MCR 9.120, the rule addressing a lawyer's conviction of a crime. Under traditional notions of rule interpretation, the exclusion of cases instituted by the filing of a criminal conviction from Rule 9.121(C) should be presumed to be an intentional omission and, I believe, buttresses my view that probation was intended to be available only in cases where a lawyer has failed to provide competent legal representation.

The hearing panel in that case originally ordered that Respondent McGuire's license should be revoked. On review, the Board remanded the matter to a Master to determine if there was sufficient evidence to support probation. After considering the deposition testimony of several medical experts, the Master concluded that the respondent's alcohol abuse related to an attempt to alleviate considerable pain due to rheumatoid arthritis contributed to respondent's mishandling of a decedent's estate and his conversion of funds from that estate. By the time the Board rendered its opinion in May 1983, Respondent McGuire had been the subject of an order of revocation for over 14 months and the Board concluded that protection of the public could be achieved by modifying discipline to a suspension of 15 months followed by probation for a period of two years.

It has now been over 25 years since the Board's Opinion in *McGuire*. I submit that it is likely that the Board's decision was colored by the fact that the respondent had already been suspended for more than a year. In any event, to the extent that McGuire could be read as precedent for the notion that probation under MCR 9.121(C) is available as a sanction even where the established misconduct is far outside the generally accepted concepts of "competence," I believe that issue should be revisited and clarified.

Board Members Carl E. Ver Beek and Craig H. Lubben were voluntarily recused and did not participate.

Board Member Billy Ben Baumann, M.D., did not participate.