STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellee,

v

Joel S. Gehrke, P 21193 ,

Respondent/Appellant,

Case No. 05-29-GA

Decided: April 4, 2008

Appearances:

Frances A. Rosinski, for Grievance Administrator, Petitioner/Appellee
Mindy L. Hitchcock, for Joel S. Gehrke, Respondent/Appellant

BOARD OPINION

Respondent filed a petition for review of the August 13, 2007 order of Clare County Hearing Panel #1 suspending respondent's license to practice law for a period of 180 days and requiring restitution to respondent's client and completion of a professional enhancement workshop. Having conducted review proceedings in accordance with MCR 9.118, we affirm the panel's order of discipline.

The four-count formal complaint in this matter alleged various misconduct stemming from the representation of Julie Winnie in various actions including parental kidnaping charges, divorce, probation violations, and tort actions. Following receipt of a stipulation from the parties indicating that at least six hearing days would be required, the Board appointed a master pursuant to MCR 9.117. The hearing on misconduct before the master took nine days for testimony and two additional days for other matters. The master issued a 25-page report. Thereafter, the hearing panel adopted the master's report and conducted a hearing on discipline.

With respect to Count One, the master found that respondent failed to communicate the basis and rate of his fee in violation of MRPC 1.5(b); failed to explain a matter to the client to the extent necessary to permit his client to make informed decisions regarding the representation in violation

of MRPC 1.4(b); and charged and collected an excessive fee in violation of MRPC 1.5(a).

Count Two alleged violations of the then-applicable MRPC 1.15(a) and (b) requiring segregation of client funds from lawyer funds, record-keeping, and accounting.[1] It also alleged that respondent made misrepresentations in his accounting and communications to his client in violation of MRPC 8.4(b) and other honesty rules, and that he failed to respond to his client's request for information regarding her funds in violation of MRPC 1.4(a). Although the master found "that the information provided to Ms. Winnie as to fees, expenses and the handling of her money, was insufficient" (Master's Report, p 14), she did not conclude that respondent violated MRPC 1.15(b) "by failing to provide full accountings upon the request of a client" (Master's Report, p 22). The allegations of dishonest conduct were not found to have been established, nor was the MRPC 1.4(a) charge expressly discussed. The master concluded that respondent violated MRPC 1.15(a) by failing to maintain complete records of the funds held in trust and "by failing to provide notice and billings to [Ms. Winnie] before withdrawing her funds as fees and costs."[2]

---

[1] Prior to its amendment in October, 2005, and at all times relevant to this matter, MRPC 1.15 read in pertinent part:

> (a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. All funds of the client paid to a lawyer or law firm, other than advances for costs and expenses, shall be deposited in an interest-bearing account in one or more identifiable banks, savings and loan associations, or credit unions maintained in the state in which the law office is situated, and no funds belonging to the lawyer or the law firm shall be deposited therein except as provided in this rule. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.
>
> (b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

[2] Although respondent did not raise the issue, we do note that the provisions of MRPC 1.15(a) (see n 1, *supra*) in effect at the times relevant here did not actually require "advances for costs and expenses to be deposited" in a trust account. Michigan's former rule was, in this respect, apparently unique. The master ruled that, "The Grievance Administrator is correct when she says that the same logic applies to an attorney's withdrawals of client funds for costs," i.e., that notice must be given to the client and that "Mr. Gehrke was required to provide Ms. Winnie with an accounting before he withdrew funds from the IOLTA for costs or fees." This is entirely logical, but MRPC 1.15(a) made an exception for the treatment of costs or expenses. The current Rule 1.15 now requires that: "Legal fees and expenses that have been paid in advance shall be deposited in a client trust account and may be withdrawn only as fees are earned or expenses incurred." MRPC 1.15(g). Even under

Count Three charged respondent with failing to keep client funds separate from his own in violation of MRPC 1.15(a), and with "misappropriating client funds" in violation of rules requiring honest conduct (i.e., MRPC 8.4(b) and MCR 9.104(A)(3)). Again, the master found no dishonest conduct, but found the MRPC 1.15 violation[3] to have been established because $8,000 in fees was taken before being earned and without explanation to the client as to the basis or rate of the fee, and because expenses (such as a sanction against him) were improperly charged to the client. A $2,000 misapplication of funds by respondent's mother, who worked in a secretarial capacity in his office, was found to be misconduct though inadvertent.

Finally, the master also found that certain allegations were not established by the evidence, such as the claim that he entered into an unwritten contingent fee in violation of MRPC 1.5(c) (alleged in Count One) and the allegations set forth in Count Four.

Respondent has petitioned for review raising various claims of error by the master and the hearing panel. We have considered the arguments raised by respondent in his extensive submissions and at the review hearing, and we are not convinced that he has met his burden of establishing prejudicial error.

First, we will discuss respondent's argument regarding Count Three which alleged, among other things, that respondent violated MRPC 1.15(a)[4] (requiring that a lawyer not commingle client funds with his or her own) when his mother/secretary withdrew $2,000 of Ms. Winnie's funds from the IOLTA account to cover office expenses. The master and panel concluded that respondent violated MRPC 5.3(c) (dealing with lawyer responsibility for acts of nonlawyer assistants). Rule 5.3(c) was not charged in the formal complaint.

Respondent argues that he should not be disciplined for an uncharged violation. We agree. As a matter of due process, a respondent may not be found guilty of misconduct not alleged in the

---

the old rule, however, an attorney was, of course, required to account to the client for advances for costs or expenses. See Michigan Formal Ethics Opinion R-7 (1990), § VI, ¶¶ 3-4. Even if we disregard the master's conclusion that notice to the client is required before withdrawing advances for costs and expenses from the trust account, it does not change the result in this case.

[3] In discussing Count Three, the master's report, at p 23, describes the $8,000 withdrawal as being violative of MRPC 1.15(b). We read this as a typographical error inasmuch as Count Three of the formal complaint alleged a violation of MRPC 1.15(a).

[4] MRPC 1.15 as it read at the time of the filing of the formal complaint and at all relevant times is set forth in n 1, *supra*. All citations to MRPC 1.15 in this opinion are to that version.

formal complaint. See *Grievance Administrator v Thomas J. Shannon*, 91-76-GA (ADB 1992), citing *In re Freid*, 388 Mich 711; 202 NW2d 692 (1972), and *In re Ruffalo*, 390 US 544 (1968). However, in this case, MRPC 1.15(a), was charged in Count Three of the formal complaint. That rule requires that a lawyer not mix client funds with lawyer funds, and holds lawyers accountable for this duty even when they may have delegated the handling of funds to staff. See, e.g., *Grievance Administrator v Kavanaugh*, DP 71/84 (ADB 1985), cited in the master's report. In *Kavanaugh*, the secretary put the client's money in the business account rather than in trust. This constituted a violation under the Code of Professional Responsibility provision that preceded MRPC 1.15(a). Accordingly, we modify the orders and report below to vacate the finding under MRPC 5.3 and clarify that the withdrawal of Ms. Winnie's funds from the IOLTA consituted misconduct under MRPC 1.15(a). We note that this $2,000 misapplication of funds by respondent's secretary was, the master found, timely addressed by respondent, and we cannot read the master's report or that of the panel as accepting the formal complaint's allegation that this conduct amounted to dishonesty.

Next, we are not persuaded that the master's evidentiary rulings constitute a basis for reversal. A few general observations are in order. While respondent's brief is lengthy and seemingly packed with detail, we must agree with the Administrator that many of the arguments are less than cogent and are waived or abandoned on review. Further, many of the rulings complained of by respondent seem to have been eclipsed by subsequent events at the hearing or are otherwise of no moment. And some of the arguments are general, repetitive and factually inaccurate. For example, respondent argues at page 16 of his brief that the master found insufficient evidence that respondent earned $11,000 in three weeks because "the AGC persuaded her to wall out Respondent's proof as indicated in Julie Winnie's own adoptive statements, such as the narrative in Exhibit 40." In fact, Exhibit 40 *was* admitted into evidence (Tr Vol XII [1/23/06], p 1647). More important, the master's report shows that the master did in fact consider respondent's characterization of Ms. Winnie's discussions with him. Finally, respondent's argument simply misses the mark in any event. As to the taking of the $8,000 from respondent's IOLTA on March 30, 2000, for example, it was respondent's own testimony that seemed of critical import to the master when she wrote, at page 5 of her report, "Mr. Gehrke testified that [the March 30 withdrawal] was in anticipation of more fees but he could not say what part was for past attorney fees and what part was for the future." This brings us closer to the essence of this unusual and somewhat troubling case.

Respondent argues that he worked zealously for his client. He does not, however, have a contemporaneous record to demonstrate the quantity or nature of this work. Neither does he have a clear fee agreement that would entitle him to certain fees based on the performance of certain tasks. Instead, there is one signed "Retainer Agreement" dated March 6, 2000 (Exhibit 1), and a few other letters purporting to summarize or estimate what respondent was owed. But, these are not always what they seem. Correspondence from respondent to his client dated April 26, 2000 (Exhibit 2), for example, is ostensibly an opinion letter regarding the propriety of his client's intention to use a power of attorney to access funds belonging to her spouse and opposing party in divorce proceedings. This letter recites: "So far, I estimate that I have 400 hours in the case @ 125/hour. You have paid me $20,000, and you agree that you owe me $30,000 if I got off the case today." Though this would seem to be a contemporaneous statement that respondent had earned $50,000 from Ms. Winnie in a little less than two months, the findings in the master's report state:

> It was Ms. Winnie's understanding that the purpose of this letter was to demonstrate her need for money to pay attorney fees to justify removing money from her husband's IRA without his permission. (Tr. Vol. II at 160, 194-195, 196.) . . . Mr. Gehrke's testimony confirms that the purpose of this letter was not to provide an accounting to Ms. Winnie but to demonstrate that Ms. Winnie needed a substantial sum of money in the event she ever needed proof to support the withdrawal of money from her husband's IRA. (Tr. Vol. IV at 597; Tr. Vol. IX at 1193.) [Master's Report, p 6.]

The master exhaustively reviewed and sifted through the record, including such writings between respondent and his client. Another piece of documentary evidence touching upon fees was Exhibit 3, an October 17, 2000 letter from respondent to Ms. Winnie, which states in part:

> To confirm our negotiations today regarding the settlement of your attorney fee for legal services which I have rendered in connection with your divorce and related pending criminal litigation, this letter reflects our mutual agreement that you owe $50,000 for efforts expended so far and to be expended to wind up this matter."

The master found that this constituted neither an accounting nor a communication of the basis or rate of the fee "given the Respondent's testimony as to the purposes of this letter and his testimony that he did not keep track of his hours, nor did he charge on an hourly basis." (Master's Report, p 7.) In another letter regarding fees, dated October 6, 2001, and admitted as Exhibit 13,

respondent disagrees with his client's reading of the letter of the preceding year (Exhibit 3). The master found:

> The letter of October 6, 2001 finally defines what Mr. Gehrke meant when he said to "wind up" the matter and that is, to the entry of the judgment of divorce. (Ex. 13.) This letter was written shortly after Ms. Winnie advised Mrs. Gehrke, and Mrs. Gehrke told Mr. Gehrke, that Ms. Winnie had sold a piece of property which would generate $151,000. In response Mrs. Gehrke told Ms. Winnie that she owed $20,000 in fees. Ms. Winnie demurred. In Mr. Gehrke's letter of October 6, 2001 (Ex. 13) he says: "The misunderstanding was on my part. I did not anticipate the war that would follow and I did not negotiate a fee to cover that contingency. I did not anticipate Kim's efforts here in the office, her assistance at trial (which, I supposed [sic], is to be accounted as a gift); nor the delay of other lawsuits and causes for other people to whom I have made promises." For the first time, Mr. Gehrke actually somewhat defines for his client what the fees she has paid cover and what they don't. [Master's Report, p 8.]

A key finding with which respondent quarrels in this case is set forth on page 9 of the master's report: "I find that the 'fee agreement' of October 17, 2000 amounted to a flat fee agreement to handle Ms. Winnie's divorce through to completion." Despite extensive and impassioned briefing and oral argument, respondent has not demonstrated that this finding lacks adequate evidentiary support in the record. See *Grievance Administrator v Lopatin*, 462 Mich 235, 247-248 n 12; 612 NW2d 120 (2000) ("This standard is akin to the clearly erroneous standard [appellate courts] use in reviewing a trial court's findings of fact in civil proceedings."). And the Court has elsewhere explained that:

> A finding is clearly erroneous if the reviewing court, on all the evidence, is left with a definite and firm conviction that a mistake has been committed. . . . Under this standard, the reviewing court cannot reverse if the trial court's view of the evidence is plausible. . . . 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).]

This standard is consistent with the holdings in many of our decisions. As we said in one such case: "it 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).

MRPC 1.5(b) required that the basis or rate of the fee to be communicated to respondent's client before or within a reasonable time after commencing the representation. There are very pragmatic reasons for such a rule. The master found that, "outside of the initial parental kidnapping fee agreement, there is no meeting of the minds between Mr. Gehrke and Ms. Winnie as to exactly what Mr. Gehrke was supposed to accomplish for Ms. Winnie, in exchange for the fees she agreed to and did pay him." (Master's Report, p 8.) The master also found that, after commencing representation of Ms. Winnie in March of 2000, and receiving compensation and money for expenses on some unspecified basis, respondent wrote the letter dated October 17, 2000, countersigned by his client, that "reflects our mutual agreement that you owe $50,000 for efforts expended so far and to be expended to wind up this matter." (Exhibit 3).

What transpired here was more than an innocuous failure to timely agree on the basis of a fee in violation of MRPC 1.5(b). The mishandling of funds and failure to keep records as required by MRPC 1.15(a), and the failure to communicate as required by MRPC 1.4(a) also took place. On our consideration of the whole record and the arguments submitted in this review proceeding, we are not persuaded that the findings of misconduct discussed above lack adequate evidentiary support. *Lopatin, supra.*

We now proceed to discuss the panel's order of discipline, and we deem the panel's bench ruling in this regard worthy of extensive quotation:

> MR. BLOEM [Panel Chairperson]: This is the resumption of the hearing of Grievance Administrator versus Joel Gehrke, case number 05-29-GA. The panel has deliberated and we made the following findings. We're using ABA Standards for imposing lawyer sanctions. We believe that the ethical duty violated, as found by the Master, was by and large a duty owed to the client, but because of the specific nature of the facts and circumstances as very, I guess voluminously briefed by both parties in this case, we believe that in a larger sense it was also a duty violated to the public, the legal system and the profession.
>
> We grappled with whether this was an intentional knowing or negligent act and I think we finally kind of hit upon that it was something that Mr. Gehrke either knew or should have known. And I'll say more about that as we move on in our findings. We think that the actual or potential injury was very large and was beyond, as we said previously, a duty owed merely to his client.

> The aggravating factors that we found – we did not find a dishonest or selfish motive by Mr. Gehrke. There were multiple offenses found by the Master. We believe that to date Mr. Gehrke has refused to acknowledge the wrongful nature of his conduct and his brief at some point is bewildering in its continued failure to accept the Master's report, which we think was actually generous to Mr. Gehrke. We believe Ms. Winnie was a vulnerable person, not merely because of her involvement in a child custody case which is, of course, a very highly charged environment, but because of the mental state that Mr. Gehrke outlines in his brief, but which we believe he failed to take into account in his advice and counsel given to Ms. Winnie during this very contentious process. And this is a difficult thing to articulate, but I'm going to try. Every attorney has had a client who believes a conspiracy against them and believes some things that are difficult to believe. And I think that at some point an attorney's ethical obligation to a client doesn't just go with "I wanted to pursue goal A, B and C" and you run with it. You need to counsel. And that is what we think was lacking in Mr. Gehrke's advise [sic], in relationship with Ms. Winnie. And that's what I find most troubling. And in Mr. Gehrke's brief he tries to have it both ways. Don't believe her, she's delusional. Don't believe her, she has a character disorder. But I acted throughout my representation of her as if none of that was true, but now you should believe it because now I'm a target. And I don't think you can have it both ways. And for me that's what's most troubling.
>
> That having been said, we did consider it a mitigat[ing] factor that we don't believe Mr. Gehrke had a dishonest motive, but that he did need to look at the situation and the total tenure [sic] of the representation appears to have been that there was a conspiracy of the school system, a conspiracy of the court system, a conspiracy of law enforcement and the medical profession in, I believe it was Delta County, all against Ms. Winnie. A tough situation to believe all that's happening. And that's why we think the duty to the client is not just that, but to the public, the legal system and the profession. That having been said, we are imposing a 180-day suspension. We are ordering restitution in the amount of $40,550.12. [HP Tr 04/19/07, pp 16-19.]

The panel applied ABA Standard 4.12 which calls for a suspension.[5] As to the appropriate length of the suspension, the panel referenced various cases involving the mishandling of funds,

[5] ABA Standard 4.12 provides: "Suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client."

including the taking of advance fees before they have been earned.[6] These authorities collectively establish that a suspension of 180 days is well within the appropriate range of discipline for knowing or careless handling of client funds, including situations in which the funds are fees paid in advance and poor office practices contributed to the misconduct.

This is, as we have said, an unusual case involving a mishandling of client funds, client objectives, and client expectations. We note and agree with the Master's characterization of the handling of these critical matters (which respondent views as "the business side of the practice") as "cavalier." Yet, we do not mean to suggest that respondent was disengaged during this representation.

We share the master's view that respondent's conduct may not have been intentional, but we agree with the panel that respondent's behavior nonetheless presents risks for the public, profession and courts. It is evident from respondent's briefs that he feels persecuted, betrayed by his client, and victimized in general. This attitude may have contributed to many of respondent's problems. Respondent's brief on review, filed October 30, 2007, states in part:

> Respondent lost his 1996 judicial reelection bid on November 6, 1996, his 38 th birthday. Nine days later, his father died. From January 1996 through November 1997, circus-like coverage of the JTC [Judicial Tenure Commission] proceedings followed in the local newspaper without abatement. Respondent suffered a 67% loss of income after the election, and he was trying to establish a law practice in the same county where all of these events occurred. Meanwhile, his children were ridiculed and assaulted in the streets. Lacking funds to afford representation before the JTC, Respondent negotiated a disposition which did not really treat the factual issues raised in the complaint. At the end of 1997, Respondent was reeling.
>
> In the winter of 2000, Julie Winnie approached Respondent armed with clinical notes from a Green Bay Ph D psychologist, Bonnie R. Nussbaum, Ph D. Winnie persuaded him that they [Winnie's children?] were in peril of abuse, and told Respondent, "Take my case and I'll help you restore your reputation." Respondent accepted this commission on these premises. [Respondent's brief on review, p 30.]

---

[6] Among the cases cited were *Grievance Administrator v Deborah C. Lynch*, 96-96-GA (ADB 1997); *Grievance Administrator v Frederick A. Sauer, Jr.*, 09-89 (ADB 1989); *Grievance Administrator v Barry R. Glaser*, DP 106/84 (ADB 1985); *Grievance Administrator v Lisa C. Watkins*, 98-6-GA (ADB 1999).

We do not wish to minimize the difficulties respondent has suffered, but we must point out that they do not excuse or mitigate the misconduct here. Ms. Winnie did not come to respondent to help him restore his reputation. Her case was not about him. She came with specific legal problems that needed handling, and, as the panel pointed out, she may have needed counseling from an objective and appropriately detached, yet diligent, lawyer. We cannot stress enough that the duties neglected by respondent here were not simply niceties or mere business practices, but were critical to the representation.

The record of the hearing on discipline before the panel also contains the testimony of Judge Charles H. Miel who called into question respondent's efficacy on behalf of clients at various times and in various cases (Tr 1/25/2007, pp 57 - 83). A colleague of respondent's also explained that respondent "does more work than we actually bill for, because he gets into sometimes excruciating detail." (Tr 1/25/2007, p 53.) To these assessments, we can add our own taken from our review of respondent's work product. Finally, we note the behavior for which respondent was disciplined while on the bench. It does not appear that this was a major aggravating factor for the panel, and we mention it only to note that the behavior there seems consistent with what we have seen here in the sense that respondent seems often to be driven by some agenda other than what is called for by the legal task at hand – even when such tasks are considered expansively.

We recite these things not to pile on respondent or to castigate him. To the contrary, because we uphold a suspension that will require him to petition for reinstatement pursuant to MCR 9.123 and MCR 9.124, we mention these issues to give respondent some guidance that may enable him to establish his fitness to return to the practice, and, in the course of doing so, re-evaluate his methods.

Respondent also seeks review of the panel's award of restitution. While offering no concrete or contemporaneous records of time spent or what was done, he estimates very low hourly rates (even though he declined to keep such records or bill by the hour) that would result if the panel's award of restitution is upheld. Our Supreme Court has given hearing panels, this Board, and the Court itself the discretion to require restitution as a condition of an order of discipline. MCR 9.106(5). This rule authorizing restitution "in an amount set by a hearing panel, the board or the Supreme Court," is also accompanied by the common law rule providing that fee forfeiture may be ordered in instances of misconduct. See *Brant v Thomas J. McCallum*, 90-18-GA; 90-42-FA (ADB 1990) (citing *Rippey v Wilson*, 280 Mich 233; 273 NW 552 (1937)).

We note that it was not the master's charge to make findings as to the overall value for the services respondent rendered. We also note that the master judged respondent to be a competent and zealous advocate at one hearing in an underlying case, the transcript of which she reviewed. Based on our review of the record, however, we are not able to confidently assert that effectiveness is always respondent's hallmark. Therefore, to the extent that respondent argues that restitution would be unjust, we disagree.[7]

Finally, we do not read the reports below as establishing a rule requiring fee agreements to be in writing,[8] or pre-approval of all reasonable expenses of the representation. Nor do we wish to send the message that a lawyer will inevitably be penalized by discipline panels for failing to draft a comprehensive and comprehensible fee agreement. Neither do we believe that the reports of the panel and master stand for the proposition that, for example, a lawyer's decision to fly to the Upper Peninsula for a case is *per se* extravagant (it probably made economic sense here). However, we do not disturb the panel's award of restitution because we believe that it very likely represents a reasonable approximation of a sum appropriate to achieve the aims of the discipline system which include not only making a complainant or other person whole, but protection of the public and the legal system through deterrence and sanctions. See, e.g., *McCallum, supra*. We cannot say that the sum awarded after the panel's review of this extensive record is erroneous or outside the range of reasonable outcomes.

---

[7] We do not regard the following statement of the master as an affirmative finding that all of respondent's fees were reasonable or that any restitution requirement would be inappropriate:

> I find that Mr. Gehrke violated MRPC 1.5(a), not because he charged too much for the work he did. As a former domestic relations lawyer, I am familiar with the level of work and intensity involved in representing clients in such emotionally charged matters and Mr. Gehrke did indeed invest considerable work in Ms. Winnie's case. I have read the transcript from the hearing on November 29, 2000 (Exhibit 13) and it is clear that on that occasion Mr. Gehrke was a zealous and competent advocate for his client. [Master's Report, p 20.]

Rather, the master was, at that point in her analysis, explaining the basis for her conclusion that the fee was excessive (or not legal) because it exceeded the amount agreed to by respondent.

[8] Of course, it is prudent, to say the least, for a lawyer to reduce an agreement to writing. That is why every lawyer gives such advice to his or her clients, citing the risk that a trier of fact may interpret the deal contrary to the intent of the parties.

Board members Lori A. McAllister, William J. Danhof, William L. Matthews, Billy Ben Baumann, M.D., Thomas G. Kienbaum and Eileen Lappin Weiser concur in this decision.

Board members George H. Lennon and Hon. Richard F. Suhrheinrich did not participate.

Board member Andrea L. Solak was recused and did not participate.