STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellee/Cross-Appellant,

v

Robert E. Butcher, P 11478,

Respondent/Appellant/Cross-Appellee,

Case No. 04-21-GA

Decided: April 18, 2007

Appearances:

Nancy R. Alberts, for Grievance Administrator, Petitioner/Appellee/Cross-Appellant
Robert E. Butcher, In Pro Per, Respondent/Appellant/Cross-Appellee

BOARD OPINION

The respondent and the Grievance Administrator both petitioned the Attorney Discipline Board for review of a hearing panel order suspending respondent's license to practice law for 90 days, with conditions. For the reasons stated below, the panel's order will be affirmed.

1. Review Proceedings

Tri-County Hearing Panel #30 of the Attorney Discipline Board issued an order in this matter on October 18, 2006 suspending respondent's license to practice law in Michigan for a period of 90 days with conditions including restitution to a decedent's estate as ordered by the Monroe County Probate Court; passage of the Multi-State Professional Responsibility Exam and the filing of an affidavit from a health care provider in addition to the other requirements for reinstatement under MCR 9.123(A). Respondent filed a timely petition for review which argued that the hearing panel's findings of misconduct and the charges in the formal complaint are "absurd." Respondent petitioned for review on the additional grounds that neither the Attorney Grievance Commission nor the hearing panel has jurisdiction to entertain charges of professional misconduct arising from his conduct in connection with a probate matter and that the proceedings constituted a violation of the due process

clauses of the Michigan and United States Constitutions. In accordance with MCR 9.115(K), respondent's petition for review and request for a stay of discipline resulted in an automatic stay of the hearing panel's order pending review by the Board. The Grievance Administrator filed a cross-petition for review on November 8, 2006 which sought review only as to the sanction imposed by the hearing panel. Briefs were submitted by both parties in support of their respective positions.

Under the subboard procedure described in MCR 9.118(C)(1), the parties presented oral arguments on February 19, 2007 to a subboard appointed by the Board's Chairperson consisting of Board Chairperson William Hampton, Board Vice-Chairperson Lori McAllister, and Board Members Richard Suhrheinrich and William Danhof. The subboard subsequently submitted its recommendation to the Attorney Discipline Board for a final decision on consideration of the whole record, including a transcript of the presentation made to the subboard.

II. The Panel's Findings of Misconduct

The record before the panel discloses that a number of arguments not directly related to the issues framed by the formal complaint were presented to the hearing panel, a situation acknowledged by the panel in its report dated March 10, 2006:

> Despite the best efforts of the parties to narrow the issues and to provide supporting material in the form of sworn statements depositions and court records, the panel must admit to a high level of frustration in attempting to sort through the material which has been presented. [Report on Misconduct, p 5.]

Following her opening statement, counsel for the Administrator offered into evidence the transcripts of two statements taken from respondent during the Administrator's investigation. The Grievance Administrator then rested.

> AGC Counsel: As you know, the rules allow us to have the respondent come in and make a sworn statement under oath and on the record, and we did that. And I will move to admit his sworn statements. There are two of them. And the transcripts are here.

> And with those and with Mr. Butcher's answer, I have proven my case. And so I am not even going to present any testimony. I'll go through those. [6/21/04 Tr at 11-12.]

However, as the panel further noted, respondent's "admissions" did not necessarily streamline the panel's hearings:

> Nevertheless, as the panel has reviewed respondent's answer to the complaint, his testimony to the panel and his statements during the Administrator's investigation, it became clear to the panel that, throughout these proceedings, the Grievance Administrator and respondent have such different views of the nature of the probate proceeding, respondent's role in connection with the Estate, and respondent's rights and responsibilities that to say that respondent "admitted" certain allegations is somewhat misleading. (By this, of course, we do not mean intentionally misleading; rather, certain terms were given such entirely different meanings by the parties that they might as well have been speaking different languages.) While the panel had a number of questions and concerns regarding respondent's actions in this matter and his understanding of who he was representing at any point in time, we attempted to maintain our focus on the Grievance Administrator's burden to establish, by a preponderance of the evidence, that respondent violated certain duties and responsibilities as set forth in Paragraph 47 of the Complaint. [Report on Misconduct, pp 5-6.]

In her opening statement to the hearing panel, counsel for the Grievance Administrator emphasized the relatively narrow scope of the Administrator's case.

> AGC Counsel: Okay. In this case, there are two general allegations of misconduct. And one is that Mr. Butcher took attorney fees in an estate without a written fee agreement and without court approval, which is prohibited by the court rules.
>
> And the other one is that he, as personal representative, mortgaged the real property belonging to the estate in order to pay his own fees, which is contrary to the statute, which

> allows a personal representative to mortgage property, but its for the benefit of interested persons. And those are the two allegations that we are dealing with. [6/21/04 Tr, p 11.]

The hearing panel ultimately concluded that the Grievance Administrator established that, despite respondent's claim that he was both the personal representative of a decedent's estate and retained counsel for the personal representative (himself), respondent was obligated under MCR 5.313(D) to mail a written fee agreement notice to "the interested persons whose interests will be affected by the payment of attorney fees," and that his failure to do so in this case resulted in violations of MCR 9.104(A)(1) and (4) and MRPC 8.4(c). The panel further found that the respondent's payment from the estate of fees to himself was contrary to MCR 5.313(E); that he mortgaged estate property for the purpose of paying fees to himself, contrary to MCL 700.3715; and that his conduct was therefore in further violation of MCR 9.104(1), (2) and (4); MRPC 1.5(a) and MRPC 8.4(a)-(c).

The standard of review to be employed by the Attorney Discipline Board is whether the hearing panel's findings of fact have proper evidentiary support in 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 n 12 (2000) (citing MCR 2.613(C)). In applying that standard of review in this case, the Board has been careful not to lose sight of the nature of the misconduct actually found by the hearing panel.

We conclude that there is adequate evidentiary support in the record for these findings by the hearing panel and that, while respondent offers a different view of his obligations under the probate code, the panel's factual findings are supported by respondent's sworn testimony before the panel and during the Grievance Administrator's investigation. (Petitioner's Exhibits 1 and 2.) The remaining charges of misconduct, including the charge in the complaint that respondent's conduct violated MRPC 1.15 (failure to segregate and hold funds belonging to a client or third party) were dismissed.

The Board has considered respondent's argument that the Attorney Grievance Commission and the hearing panel are without jurisdiction to consider professional misconduct arising from respondent's participation as an attorney and as a personal representative in the underlying probate proceeding under the supervision of the Monroe County Probate Court. Respondent's argument that those actions may not be considered in a discipline proceeding is without merit. It is well settled that an attorney may be disciplined for activity unrelated to the practice of law, *Grievance Administrator v Nickels*, 422 Mich 254, 260 (1985), and that it is the responsibility of every member of the Bar to carry out their activities, both public and private, with circumspection. *In re Grimes*, 414 Mich 483, 490; 326 NW2d 380 (1982). In the instant matter, respondent Butcher was consulted and retained because he was a lawyer. Respondent's obligations as an officer of the court and as a member of the Bar while handling the affairs of the estate did not switch on and off depending on whether he was wearing his "personal representative" hat or was acting in his variously described roles as attorney for the estate, attorney for the personal representative or the attorney for Mr. Frysinger.

Respondent has provided no further explanation or citation to legal authority in support of his claim that this discipline proceeding constitutes a violation of the due process clauses of the Michigan and United States constitutions and that argument is also rejected.

It is respondent's express position that his interpretation of the probate statutes and the applicable rules governing probate proceedings in Michigan is right and that everyone else who has considered his conduct - the probate judge, the Grievance Administrator, the hearing panel and the successor personal representative (Monroe Bank and Trust) - are all wrong. It is not necessary for the Attorney Discipline Board to review the entire probate proceeding from which these charges arose. There is adequate evidentiary support in the record for the hearing panel's findings and conclusions with regard to the limited charges of misconduct arising from respondent's failure to comply with MCR 5.313(E) and MCL 700.3715 and those findings of misconduct are affirmed.

III. Review of the Sanction Imposed

Following the issuance of its report on the charges of misconduct, the hearing panel directed the parties to file a sanction brief to include an analysis of the appropriate discipline under the American Bar Association's Standards for Imposing Lawyer Sanctions and applicable case law.

Subsequent to the filing of those briefs, the panel conducted a separate hearing on discipline in accordance with MCR 9.115(J)(2) and it issued its report and order on October 18, 2006. The panel ordered that respondent should be suspended from the practice of law in Michigan for 90 days with the following conditions: (1) respondent must take and pass the Multistate Professional Responsibility Examination and provide proof of passage; (2) respondent shall present an affidavit from a licensed psychiatrist or psychologist ("clinician") attesting that respondent can "consistently function at a cognitive and otherwise relevant level to discharge the responsibilities of an actively practicing member of the bar;" and (3) Respondent shall pay restitution in the amount of $17,159.98 in accordance with the outstanding order of the Monroe County Probate Court. Each of these conditions is to be fulfilled prior to respondent's eligibility to file an affidavit for reinstatement under MCR 9.123(A).

In seeking increased discipline from the Board, the Grievance Administrator states:

> Even though the imposed sanction is a thoughtful one tailored to this particular respondent and one which will result in a permanent suspension, petitioner requests Board review in order to determine whether it is consistent with precedent and policies of the Board as well as the Michigan Supreme Court. [Grievance Administrator's Brief in Support of Petition for Review, p 7.]

Inasmuch as no specific precedent or policy of the Supreme Court has been brought to the Board's attention, we are left to presume that the Supreme Court policy referred to is the Court's direction in *Grievance Administrator v Lopatin*, 462 Mich 235; 612 NW2d 120 (2000) that hearing panel's and the Board must utilize the American Bar Association's Standards for Imposing Lawyer Sanctions ("Standards") in their determination of the level of discipline.

The hearing panel's report on discipline does reflect its consideration of the Standards. We conclude that the panel's finding that a suspension is the base-line sanction in this case under the application of either Standard 4.12, Standard 7.0, or both, was well considered and appropriate in this case.

Any consideration of a particular level of suspension (a six month, one year or three year suspension rather than the 90 day suspension imposed here, for example) must take place outside

the framework of the Standards. Once professional misconduct has been established in a proceeding before a hearing panel or the Board, the Standards are the required framework for distinguishing among cases which warrant reprimand, suspension or disbarment but the Standards themselves do not provide guidance with regard to a specific length of discipline.

In this case, the Administrator seeks a suspension of at least three years for the reason that:

> Now that this matter has been brought before the Board, however, this sanction [90-day suspension] will become a matter of precedent. Board approval of a sanction of 90 days for an intentional breach of fiduciary duty, especially where serious injury is incurred, will result in an unacceptable and unintended precedent. [Grievance Administrator's Brief in Support of Cross-Petition for Review, p 4.]

The Administrator's argument that the panel's decision conflicts with prior Board precedent is set forth as follows:

> Since Grievance Administrator v Frederick A. Petz, ADB Case No. 99-102-GA; 99-130-FA (2001), this Board has consistently held that intentional conversion of client funds for the lawyer's personal or business use coupled with the absence of compelling mitigation requires disbarment. The Board has also held that breach of a fiduciary duty, even if not in the course of the attorney-client relationship, requires disbarment. Grievance Administrator v Samuel Thomas, ADB Case No. 95-172-GA. [GA's Brief in Support of Petition for Review, p 5.]

The holding attributed to the Board does not appear in *Thomas*, *supra*. In that case, a hearing panel ordered revocation accompanied by restitution in the amount of $304,130.60 in the case of an attorney who came into possession of funds as the result of a business relationship with certain individuals and not as the result of an attorney-client relationship. Neither the Grievance Administrator nor the respondent petitioned for review of that panel order. However, the complainant petitioned for review seeking modification of both the panel's finding of a business relationship between respondent and complainant and the amount of restitution to be paid. The Attorney Discipline Board did not issue an opinion in that case but simply issued an order finding that there was evidentiary support in the record for the panel's conclusions with regard to the

business relationship and the amount of restitution. The Board's order in *Thomas* establishes no precedent as to the appropriate level of discipline when misappropriation results from a fiduciary relationship existing outside the attorney-client relationship inasmuch as the Board did not address that issue in that case.

The Board did hold in *Grievance Administrator v Petz*, ADB Case No. 99-102-GA; 99-130-FA (2001), that intentional conversion of client funds for the lawyer's personal or business use, coupled with the absence of compelling mitigation, will generally result in disbarment and *Petz* is properly cited for that proposition. Similar cases involving a lawyer's intentional conversion of client funds in violation of MRPC 1.15 have indeed resulted in disbarment.

In the instant case, however, the panel explicitly found that respondent's conduct, as defined in the complaint and established by the evidence, did not constitute a violation of MRPC 1.15. The Grievance Administrator's petition for review in this case was limited to the sanction imposed for the established misconduct. The findings of misconduct in this case do not include findings of misappropriation or conversion of funds. We do not share the Administrator's fear that the sanction imposed in this case will set an unwise or unintended precedent in future cases involving a lawyer's intentional conversion of funds, whether from a client or as the result of some other fiduciary relationship. That is not the misconduct argued to the panel and that is not what the panel found.

Before concluding that the provisions of MRPC 1.15 were not violated in this case, the panel took the somewhat unusual step of taking that charge under advisement and requesting that the Grievance Administrator file a brief addressing the applicability of that rule to the facts in this case. As emphasized above, the panel's dismissal of the Rule 1.15 allegation was not raised as a grounds for review. The sanction which we affirm in this case should not be measured against sanctions imposed in other cases involving quite dissimilar misconduct.

In terms of prior Board opinions which may involve comparable sanctions for similar misconduct, a more appropriate example may be the Board's opinion in *Grievance Administrator v Thomas B. Richardson*, ADB Case No. 96-97-GA (1998). In that case, the panel found that the respondent failed to exercise reasonable diligence in completing the administration of a decedent's estate; failed to communicate adequately with his client; failed to comply with the then applicable provisions of MCR 8.303; failed to segregate client funds from his personal funds and charged an

excessive fee for legal services in an invoice for fees which falsely implied that he had completed all of the necessary probate procedures. The panel in that case concluded that respondent's conduct was negligent in some respects and that respondent "demonstrated, at best, an elementary understanding of the procedures, papers and fees necessary to conclude the administration of a decedent's estate in Oakland County Probate Court." *Richardson*, *supra*, p 2. The Grievance Administrator petitioned for review of the panel's decision in *Richardson* to impose a 30 day suspension accompanied by conditions including a law office management seminar; passage of the ethics portion of the Multistate Bar Examination and practice under the supervision of a mentor for a period of one year. On review, the Board noted that it had not been presented with case authority for the proposition that payment of an attorney's claimed fees without proper consent of the interested parties or approval by the probate court constitutes misappropriation. The Board said,

> However, in this case it is clear that respondent's withdrawal of funds for attorney fees did not approach the level of willful conversion or embezzlement of estate funds which would be expected to result in discipline ranging from a suspension of one year to license revocation.

Similarly, in *Grievance Administrator v Lisa C. Watkins*, ADB Case No. 98-06-GA; 98-22-FA (1999), the Board was not persuaded that a respondent's improper request for payment of attorney fees contrary to the applicable probate rules could, or should, be equated with the more egregious misappropriation cases which had historically resulted in discipline ranging from a three year suspension to disbarment. In *Watkins*, the Board increased the length of suspension from 60 days to 180 days but we note that *Watkins* involved three counts of misconduct pertaining to the respondent's conduct in probate matters, including actual commingling of estate funds with her own, coupled with her failure to answer the formal complaint.

IV. Conclusion

It has not been shown that the sanctions imposed by the hearing panel are inconsistent with either the ABA Standards or prior precedent of the Board with respect to either the length of the suspension or the conditions that must be satisfied before respondent is eligible to seek

reinstatement. On the contrary, those conditions, imposed under MCR 9.106(2) which allows additional conditions "relevant to the established misconduct," appear to have been crafted in such a way as to require respondent's compliance with an outstanding order entered by the Monroe County Probate Court and to ensure protection of the public in the event respondent seeks reinstatement to the active practice of law.

For all of these reasons, the hearing panel's order is affirmed.

Board members Lori A. McAllister, Rev. Ira Combs, Jr., George H. Lennon, Hon. Richard F. Suhrheinrich, William J. Danhof, and William L. Matthews, C.P.A., concur in this decision.

Board members William P. Hampton, and Billy Ben Baumann, M.D., did not participate in the Board's decision to accept the subboard's recommendation.

Board member Andrea L. Solak was recused from this matter.