STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellant,

v

Robert E. Jones, P 31661,

Respondent/Appellee,

Case No[s]. 05-09-GA

Decided: January 25, 2007

Appearances:
Cynthia C. Bullington, for Grievance Administrator, Petitioner/Appellant
Robert E. Jones, In Pro Per, Respondent/Appellee

BOARD OPINION

The Grievance Administrator has petitioned the Attorney Discipline Board for review of a hearing panel order, entered March 24, 2006, suspending the respondent's license for a period of 90 days[1] commencing April 15, 2006, and imposing an additional condition of restitution. The Administrator argues that the panel's factual findings were erroneous in two respects and that the discipline should be increased. The parties were ordered to appear before the Board on September 15, 2006, to show cause why the hearing panel's order of discipline should not be affirmed.

For the reasons stated below, we conclude that the hearing panel's findings and its decision to impose a 90 day suspension were appropriate and should be affirmed. However, we have determined that protection of the public requires modification of the panel's order by imposing additional conditions described in greater detail below, including respondent's filing of a complete inventory of the client files in his possession; appointment of a practice monitor to review respondent's office practices and procedures and evaluation by the State Bar's Lawyers and Judges Assistance Program.

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[1] The suspension ordered by the hearing panel was not stayed during the review proceedings. Respondent filed an affidavit of compliance in accordance with MCR 9.123(A) on July 17, 2006 and was automatically reinstated on that date.

PROCEEDINGS BEFORE THE PANEL

The Grievance Administrator filed a formal complaint in this matter on January 12, 2005, based upon alleged acts and omissions in respondent's handling of a decedent's estate. Respondent was hired by Agnes Proctor in December 1996 to probate the estate of her sister, Ethel Shepard, who had died intestate in Wayne County, Michigan the previous month. At the time of her death, Ms. Shepard owned a residence in Detroit, personal property (including antiques), and liquid assets. It is not disputed that respondent commenced proceedings in the Wayne County Probate Court in March 1997. Briefly summarized, the complaint charged that respondent neglected the handling of the estate from mid-1997 to early 2004; failed to take appropriate action to garner and conserve assets of the estate and, in fact, abandoned his representation of the estate; failed to maintain communications with Mrs. Proctor concerning the status of the estate from mid-1997 to early 2004; made repeated misrepresentations to Mrs. Proctor from mid-1997 to early 2004 that he was handling the estate but that it would take six years to process; misrepresented to an attorney inquiring on Mrs. Proctor's behalf in April 2004 that he was working on the matter and had a meeting scheduled with the court probate analyst in two weeks; misrepresented to that attorney, on or about May 5, 2004 that he was working on the matter and was in contact with a probate analyst; lost and/or misplaced the client file relating to the estate and failed to refund an unearned fee.

The panel conducted a hearing on the charges of misconduct in August 2005. The Grievance Administrator called as witnesses respondent and attorney Shaun Ayer, the attorney who contacted respondent about the estate in April and May 2004. (Mr. Ayer is married to Agnes Proctor's granddaughter and he is the complainant in this case.)

At the close of the hearing, the panel put its findings with respect to misconduct on the record. The panel found that the allegations in paragraphs 17(a)-(d) were established along with the allegation in Paragraph 17(g). The panel also announced its conclusions that the following rules were violated:

> MRPC 1.1(c) (neglect of a matter entrusted to lawyer);
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> MRPC 1.2(a) (failure to seek client's objectives);
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> MRPC 1.3 (failure to act with reasonable diligence in representing a client);
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> MRPC 1.4(a) and (b) (failure to keep client reasonably informed and explain matter to enable client to make informed decisions);

> MRPC 4.1 ("In the course of representing a client, a lawyer shall not knowingly make a false statement of material fact or law to a third person."), and,
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> MCR 9.104(A)(1)-(4).

In plain language, the panel found that respondent neglected the handling of the estate, "failed to take appropriate action to garner and conserve assets in the estate," abandoned the estate, failed to communicate with his client, and made a misrepresentation to attorney Ayer in the second telephone conversation between respondent and Ayer.

The panel conducted a separate hearing on discipline in February 2006 and filed its report and order on March 24, 2006, suspending respondent for 90 days. Rejecting the Grievance Administrator's request for disbarment, the panel found that Standard 4.42 of the American Bar Association's Standards for Imposing Lawyer Sanctions was applicable rather than Standard 4.41, the Standard which suggests that disbarment is generally appropriate when a lawyer abandons the practice, knowingly fails to perform services for a client or engages in a pattern of neglect resulting in serious or potentially serious injury to a client. Under ABA Standard 4.42:

> "Suspension is generally appropriate when (a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client, or (b) a lawyer engages in a pattern of neglect and causes injury or potential injury to a client."

The panel also found ABA Standard 4.62[2] to be applicable in light of respondent's deliberate misrepresentation to another attorney about his actions on behalf of the estate. The panel concluded that "the misrepresentation itself [did not lead] to the type of serious injury to the client or a type or degree contemplated under the letter or the spirit of Standard 4.61 or the cases included in the commentary." (Hearing Panel report, p 3.)

Finally, with respect to ABA Standard 8.1 cited by the Grievance Administrator in support of disbarment when a lawyer knowingly engages in the same or similar conduct for which he had previously been suspended, the panel noted respondent's prior misconduct but concluded that "the passage of a significant amount of time without public discipline takes this case out of the type of

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[2] ABA Standard 4.62 provides:

> Suspension is generally appropriate when a lawyer knowingly deceives a client, and causes injury or potential injury to the client.

situation contemplated in Standard 8.1(b)."[3] In addition to the 90 day suspension, the panel ordered that the respondent make restitution for certain insurance proceeds that had apparently escheated to the State of Michigan in the event that attorney Ayer was unsuccessful in recovering those funds for the estate.

DISCUSSION

The standard for this Board's review of a hearing panel's findings of fact is described in *Grievance Administrator v Edgar J. Dietrich*, 99-145-GA (ADB 2001), p 2:

> 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). See also, *Grievance Administrator v T. Patrick Freydl*, 96-193-GA (ADB 1998). "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)).
>
> Because the hearing panel has the opportunity to observe the witnesses during their testimony, the Board defers to the panel's assessment of their demeanor and credibility. *Grievance Administrator v Neil C. Szabo*, 96-228-GA (ADB 1998); *Grievance Administrator v Deborah C. Lynch*, No 96-96-GA (ADB 1997). See also *In re McWhorter*, 449 Mich 130, 136 n 7 (1995).
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> In short, "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).

I.

The Administrator first challenges the panel's finding that the administrator failed to prove the allegations of paragraph 17(f) of the formal complaint (i.e., that respondent lied when attorney Ayer first called respondent).

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[3] Respondent was suspended for 60 days in March 1960; reprimanded (by consent) in September 1991; and suspended for 60 days (by consent) in April 1995. The Grievance Administrator also introduced respondent's admonishments in May 2001 and July 2004 as well as an undated letter of Admonishment, possibly circa 1988. (Petitioner's Exhibit 15.)

Petitioner argues, in his brief on review, as follows:

> In his Answer to the Formal Complaint, Respondent admitted that on April 30, 2004, when Attorney Ayer asked about the status of the estate, he said that he was working on the matter and had a meeting scheduled with a court probate analyst in two weeks. Respondent clearly admitted making the statement. The statement was false *because in Respondent's answer to the request for investigation, he claimed that he could not locate the client file*. Respondent did not locate the file until after the formal complaint was filed. Without the client file, it is difficult to see how one can work on a file or have a basis to meet with an analyst. Clearly, the panel's dismissal of the allegation was contrary to the substantial evidence in the record. [Petitioner's Appeal Brief, p 7; emphasis added.]

At the hearing, respondent argued that he went to the probate court after he received the call from Mr. Ayer.[4] Respondent's testimony under cross-examination by counsel for the Administrator was consistent. (See Tr 8/17/05, pp 28-29.) Mr. Ayer's testimony was somewhat different. Mr. Ayer testified that in the first conversation with respondent, respondent "indicated . . . that he had a meeting in two weeks with an analyst." (Tr 8/17/05, p 53-54.)

Petitioner's Exhibit #8 is a transcript of the second phone call Mr. Ayer placed to respondent. It was admitted by stipulation of the parties (Tr 8/17/05, pp 5-8). Mr. Ayer testified that he taped the call and his secretary transcribed it (Tr 8/17/05, p 66). In the transcript of the conversation, the following exchange occurred:

> Ayer: Ok, look I am calling to give you the benefit of the doubt here but I know how old these people are and you know I am not too happy with what I am seeing here now, and what I've been told because you know and I know you don't have a meeting in 2 weeks, okay.
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> Jones: No, after you called me I scheduled a meeting with the analyst. [Petitioner's Exhibit 8.]

The panel's decision that the Administrator did not prove by a preponderance of the evidence the allegations in paragraph 17(f) is supported by the record. Under the standard of review discussed above, and under the clearly erroneous standard employed when an appellate court reviews a circuit

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[4] In his opening statement he stated: "After I was contacted by Mr. Ayer, I went to try and look for the Wayne County Probate Court file." (Tr 8/17/05, p 13 L23-24),

court decision, great deference is afforded to the trier of fact who heard the evidence first hand. "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).

In his testimony and argument, respondent maintained that he said he contacted (or would contact) the probate analyst after the first phone call. Mr. Ayer had a different recollection which was set forth in paragraph 7 of his request for investigation (specifically, that "Mr. Jones told me he was working on the matter and that he had a meeting with an analyst at the probate court in two weeks"). But even Mr. Ayer's testimony regarding the second phone call (see Tr 8/17/05, pp 66-67), and the transcript of that call seem to indicate that respondent maintained – as early as the second call – that he contacted the analyst *after* the first call. The panel resolved the evidentiary conflict, and it cannot be said that the panel's view is implausible or unsupported.

II.

The Administrator also argues that the panel erred in failing to adopt the argument that respondent lied during the proceedings and fabricated the letters admitted as respondent's exhibits I, J, and K. These are letters dated between March and August, 1997, and addressed to the personal representative who retained respondent. The Administrator argued that the letters were forgeries because the letterhead was crooked, the address of the personal representative was incorrect, and that Mr. Ayer didn't find the letters in Ms. Proctor's papers, and he thought her papers were very complete. The Administrator also argued that respondent had initially testified that a secretary with the initials DME was not employed by him during the dates of the letters.

Respondent vehemently disputed the claim of fraud, and stated to the panel: "I don't know the exact date that my secretary changed. I told her that I thought it was November of 1997. It could have been April. It could have been 1996. I don't keep, you know, exact records of, you know, with respect to that." None of the factors argued by petitioner clearly establish that the letters were not genuine. The panel heard and observed all of the evidence, including respondent's demeanor while disavowing fraud. We defer to the panel's finding.

III.

The Administrator also argues that discipline should be increased. Much of the argument is dependent upon a finding that respondent made several misrepresentations, including fraudulent or deceptive practices in the course of the discipline proceedings. As noted above, we do not agree that the panel erred in finding to the contrary. The panel found that respondent lied to Ayer in the second phone call when he represented "that he was working on the matter and was in contact with a court probate analyst" (Formal Complaint, ¶ 17(g)).

The Administrator argues that the panel improperly applied the ABA Standards for Imposing Lawyer Sanctions, and mainly attacks the panel's choice of Standard 4.62 over Standard 4.61. Standard 4.6 provides in pertinent part:

> 4.6 Lack of Candor
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> Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases where the lawyer engages in fraud, deceit, or misrepresentation directed toward a client:
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> 4.61 Disbarment is generally appropriate when a lawyer knowingly deceives a client with the intent to benefit the lawyer or another, and causes serious injury or potential serious injury to a client.
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> 4.62 Suspension is generally appropriate when a lawyer knowingly deceives a client, and causes injury or potential injury to the client.
>
> 4.63 Reprimand is generally appropriate when a lawyer negligently fails to provide a client with accurate or complete information, and causes injury or potential inury to the client.

As the panel explained at page 3 of its Report on Discipline, respondent's misrepresentation that he had contact with a probate analyst did not lead to "the type of serious injury to the client of a type or degree contemplated under the letter or the spirit of Standard 4.61 or the cases included in the commentary." The commentary to Standard 4.61 references two cases involving misrepresentations by lawyers to their clients regarding the purpose for a loan in the first case and the lawyer's solvency in the second. The commentary under Standard 4.62 discusses a case in which a lawyer misrepresented the status of cases to three separate clients and the clients suffered injury on the order of summary judgment in two cases and loss of use of a settlement payment for a period of time in the other.

Finally, at the hearing on discipline, respondent's record of prior discipline was introduced and addressed. To the extent that the Administrator argues disbarment is appropriate under Standard 8.1, we note that rigid application of that ABA Standard has not been the practice in Michigan. Rather, prior discipline is assessed as an aggravating factor under Standard 9.22. The panel's decision not to follow Standard 8.1's recommendation of disbarment was appropriate. Grievance Administrator v Ralph E. Musilli, 98-216-GA (ADB 2000), citing Grievance Administrator v Lopatin, 462 Mich 235, 248 n 13; 612 NW2d 120 (2000). However, we agree with the Administrator that, "[w]hile the age of a prior discipline can be considered in mitigation [footnoote omitted], it cannot void its consideration." We do not read the panel report as entirely disregarding respondent's prior misconduct. Instead, it appears that the panel was gauging the possible successful impact of the prior discipline as a deterrent when it noted: "When respondent made the misrepresentation to attorney Ayer in 2004, approximately nine years had elapsed since respondent's prior discipline. We believe that this passage of a significant amount of time without public discipline takes this case out of the type of situation contemplated in Standard 8.1(b)."

We have considered respondent's record of prior misconduct carefully. His prior 60-day suspensions for misrepresentation to clients about the status of their cases evidences a disturbing pattern. These dispositions occurred in 1991 and 1995 respectively. Although discipline at or above the level of a 180-day suspension may be generally appropriate in a case such as this, we will defer to the panel's judgment that under the circumstances of this case, including respondent's apparently sincere expressions of embarrassment and remorse, that a 90-day suspension and conditional order of restitution – with some modifications – adequately protects the public, the courts and the legal profession.

In addition to the condition imposed by the hearing panel regarding possible restitution, the following conditions will be imposed:

1. Respondent shall collect and inventory all of his open and closed client files, including those alleged to be stored at the home of his ex-wife. Respondent shall file with the Grievance Administrator a complete inventory of the files in his possession, both open and closed, which shall include his affidavit that he has reviewed the contents of each file, that all appropriate action has been taken in those files deemed to be "closed," and that he has made diligent effort to return any and all client documents or property if appropriate. A false statement contained in the affidavit may be grounds for disbarment.

2. A practice monitor shall be appointed by the Board to review respondent's practices and procedures. Respondent shall have 60 days to correct any deficiencies and implement procedures as recommended by the monitor. The Administrator may grant one 60-day extension. If the parties cannot agree, or if a further extension of time for compliance is requested by respondent, a showing of good cause shall be set forth. At the conclusion of that period for compliance, the monitor shall submit a report to the Grievance Administrator and the Attorney Discipline Board indicating whether or not the deficiencies identified have been remedied and procedures recommended have been implemented. The report may include the monitor's further recommendations with regard to periodic review of respondent's office practices in the future.

3. Respondent shall undergo an evaluation by the State Bar's Lawyers and Judges Assistance Program.

4. Any and all costs associated with any of these conditions shall be the responsibility of respondent.

Board members Lori A. McAllister, Billy Ben Baumann, M.D., Hon. Richard F. Suhrheinrich, and William L. Matthews, C.P.A., concur in this opinion.

Board member Rev. Ira Combs, Jr. dissenting:

While I do not necessarily disagree that additional conditions are appropriate in this case, I would nevertheless remand this case to the hearing panel for a supplemental report on the charges of misrepresentation. I do not feel that those charges have been adequately addressed. If established, those charges could warrant more serious discipline.

Board member William P. Hampton, George H. Lennon, and William J. Danhof, did not participate.