Grievance Administrator,

Petitioner/Appellee,

v

Ivan D. Brown, P 47645,

Respondent/Appellant.

97-136-GA

Decided: November 11, 1998

BOARD OPINION

Respondent admitted that he prepared a quit claim deed and an assignment of seller's interest in a land contract for a client and signed those documents as a witness even though he did not, in fact, personally witness the grantor's signing of those documents. The hearing panel ordered that respondent's license to practice law in Michigan should be suspended for 60 days and that respondent should pay costs of the proceedings in the amount of $1656.70. Respondent petitioned for review on the grounds that a license suspension is not warranted under all of the circumstances. He also seeks a reduction in the assessment of costs. For the reasons discussed below, we reduce the discipline to a reprimand and modify the assessment of costs.

The hearing panel's findings and conclusions with regard to the charges of misconduct are not challenged by either party. Those findings, set forth in some detail in the hearing panel's report issued April 2, 1998, are briefly summarized: On or about February 7, 1995, respondent met personally with Elizabeth O'Connell and her son Thomas. At that meeting, Ms. O'Connell expressed her desire to transfer joint ownership of her home in Jackson, Michigan to her four sons upon her death without the necessity of probate proceedings. To accomplish that goal, respondent agreed to draft a quit claim deed transferring title from Ms. O'Connell to herself and her four sons, Thomas, John, Gary and David, as joint tenants with rights of survivorship. He also

prepared an assignment of interest in a land contract. The hearing panel made a specific factual finding that respondent drafted those documents on February 7, 1995, at the request of Elizabeth O'Connell.[1] Respondent made an appointment for her to execute them at his office on February 23, 1995. That appointment was cancelled due to her illness. The panel found that Thomas O'Connell returned the documents to respondent's office on or about March 13, 1995, representing that they had been signed by his mother who was too ill to come to the office. Respondent witnessed the documents and instructed his secretary to notarize them. The documents purport to have been signed and notarized on February 23, 1995.

In fact, the record discloses that Elizabeth O'Connell died on March 11, 1995. After considering the testimony of Elizabeth O'Connell's four sons and other family members, the panel found that it was established by a clear preponderance of the evidence, without any conflicting testimony, that the signatures on the quit claim deed and the assignment of interest in land contract were forgeries which were physically performed by one of Elizabeth O'Connell's daughters-in-law on March 12, 1995, with the full knowledge and consent of the four sons. The panel entered a specific factual finding that respondent was mislead by the statements of Thomas O'Connell when the documents were returned to his office and that respondent did not know or have reason to know that Elizabeth O'Connell was deceased when he witnessed the deed. The hearing panel dismissed paragraph 7(a), (b), (c) and (e), which charged that respondent advised, participated in or had knowledge that the documents were signed after Elizabeth O'Connell's death. The panel found misconduct only as to paragraph 7(d) which charged that:

---

[1] At the review hearing, the Administrator's counsel acknowledged that the assertion in the counter-statement of facts in his appellate brief that respondent drafted the documents on March 12, 1996 was not taken from the record but was based on the allegation in the formal complaint. The typographical error with regard to the year was acknowledged at the panel hearing. (Tr. p 10.) The issue of whether the respondent drafted the documents on February 7 or March 12 was contested and was resolved in respondent's favor by the panel's finding that they were drafted on February 7, 1995. For the requirements of a counter-statement of facts in an appellate brief, see MCR 7.212(D)(3)(b).

> (d) He signed the documents as a witness to the signatures of the parties when he did not, in fact, witness the signing of the document by Elizabeth M. O'Connell.

The hearing panel conducted a separate hearing to address the issue of discipline. In its report, the panel noted mitigating factors including 1) an absence of a prior disciplinary record; 2) an absence of a dishonest or selfish motive; 3) a cooperative attitude toward the disciplinary proceedings; 4) inexperience in the practice of law; and, 5) remorse. The panel ordered a suspension of 60 days and assessed the itemized costs of the Attorney Grievance Commission and Attorney Discipline Board in the amount of $1656.70.

Level of Discipline

The Board has the power to "affirm, amend, reverse or nullify the order of the hearing panel in whole or in part or order other discipline." MCR 9.11 (D). As the Grievance Administrator correctly notes, the Board reviews a hearing panel's findings for proper evidentiary support, while possessing a measure of discretion with regard to the appropriate level of discipline. Grievance Administrator v James H. Ebel, 94-5-GA (ADB 1995), citing Grievance Administrator v August, 438 Mich 296, 304 (ADB 1991); Matter of Daggs, 411 Mich 304, 318-319 (ADB 1981). The grant of power given to the Board by the Court is not unlimited, and as the Administrator further notes, the Court may find an abuse of discretion under proper circumstances. Matter of Daggs, supra, p 319. The Court made it clear in Daggs, however, that the Board is not bound to the same standard of review when considering the level of discipline imposed by a panel.

> While not inconsistent with the powers granted in GCR 1963, 967.4 [now MCR 9.110(E)], an abuse of discretion standard would operate to prevent the Board from effectively carrying out its overview function of continuity and consistency in discipline imposed. State Bar Grievance Administrator v Williams, 394 Mich 5; 228 NW2d 222 (1975). Hearing panels meet infrequently and are exposed to a relatively small number of discipline situations. The

> Board suffers from no such disadvantage. Matter of Daggs, supra, pp 319-320.

In Daggs, the Board found that a two-year suspension imposed by a panel was too severe in light of the proven misconduct and reduced the discipline to a suspension of one year. Notwithstanding the claim on appeal that the Board substituted its judgment for that of the panel, the Court found that the Board properly exercised its overview function and that the Board's action was principled and reasoned.

The Administrator asks that a 60-day suspension be affirmed in this case. He argues:

> Clearly the hearing panel gave considerable weight to the fact that respondent placed his name as a witness on a document which would impact not only respondent's client but also the client's three brothers. The fraudulent deed, if successfully filed by respondent's client, would have given the client rights superior to his brothers with regard to the property in question. [GA Brief, p 5.]

While we wish to neither condone nor minimize the nature of respondent's conduct as found by the panel, a comment on this argument may be appropriate. First, it bears noting that the deed was not only not "filed" but there was, apparently, no attempt by anyone to actually have it recorded. Just as the record discloses that the four sons of Elizabeth O'Connell all knew about the deed and its contents and all agreed that one of Elizabeth O'Connell's daughters-in-law should sign her name to it, the record is also clear that it was the brothers' joint decision not to attempt to record the deed. As one of the brothers, David O'Connell, testified:

> But after the more we had talked about it and we felt uncomfortable with it, that's why we did not do it, because we did feel uncomfortable about it. We went ahead and probated. [Tr. p 154.]
>
> * * *
>
> Q. Now later on you indicated that you decided to probate the estate as you

put it?

A. Yes.

Q. Who decided that?

A. Really the boys when we couldn't agree on everything.

Q. Could you name the people?

A. Well, there was John, Gary, Tommy and myself.

Q. The four of you decided to probate this?

A. Yes. We couldn't agree.

Q. So you decided that you would not record this deed, is that correct?

A. Yes.
[Tr. p 155-156.]

We are dubious of the proposition that the recording of the quit claim deed which was improperly signed with the full knowledge and consent of Elizabeth O'Connell's four sons would, in and of itself, have given Thomas O'Connell any rights to the property superior to those of his three brothers. Had the quit claim deed been properly executed by Elizabeth O'Connell prior to her death, the property in question would have passed automatically to her four sons as joint tenants with rights of survivorship. The record discloses that Elizabeth O'Connell died intestate leaving an estate consisting primarily of the house to be divided by her sons as heirs-at-law. The question of whether or not Thomas O'Connell would have been in a substantially better position vis-a-vis his brothers as a joint tenant as opposed to an heir of the estate was an issue which was not developed in the record. The record as a whole supports the conclusion that Elizabeth O'Connell wished to transfer her home to her sons without the need for probate proceedings, that her sons originally intended to carry out that transfer by placing their mother's purported signature on the quit claim deed after her death and that they subsequently decided not to record the deed.

Respondent calls our attention to several Michigan discipline cases in which a reprimand was imposed for similar misconduct. In Grievance Administrator v Fischel, ADB 227/87 (ADB 1989), the Board

affirmed a reprimand where respondent misrepresented to a hearing panel that a doctor's affidavit, submitted in connection with a pleading, had been signed in the presence of a notary, when, in fact, it had not. In Grievance Administrator v Jones, 91-67-GA, (ADB 1991) the Grievance Administrator and the Attorney Grievance Commission stipulated to a consent order of discipline for a reprimand where the respondent post-dated a land contract to a date six months after its actual date of execution with the apparent intent of assisting his clients in avoiding the payment of a real estate commission. In both cases, the misconduct was, arguably, more egregious than in the instant matter.

We have also considered the discipline imposed in cases from other jurisdictions. In Kentucky Bar Association v Alerding, 929 SW2d 190 (1996), respondent was himself a notary. His client brought in a bond assignment allegedly signed by the client's wife. Respondent admitted notarizing the signature although it was not signed in his presence. He also admitted that his notary commission had expired. The Court accepted the recommendation of the Kentucky Bar Board of Governors that the lawyer be reprimanded.

In a 1990 Missouri case, the respondent/attorney admitted signing her client's name and then notarizing the signature on two court affidavits filed in California in a custody dispute. The attorney explained that she spoke to her client over the telephone and that he had authorized her to sign his name to the documents. The master found that the lawyer had her client's authorization to sign his name and that the affidavits were not used to the disadvantage of the opposing party. The master nevertheless found that the false notarization was a false statement of material fact to a tribunal. The Missouri Supreme Court ordered a reprimand. In re Wallingford, 799 SW2d 70 (Mo. Banc 1990).

As the Supreme Court has noted, "review of these proceedings is best handled on a case-by-case basis," Grievance Administrator v Nickels, 422 Mich 254 (1985), and attorney misconduct cases generally stand on their own facts. In re Grimes 414 Mich 483, 490; 326 NW2d 380 (1982). We neither condone respondent's conduct nor suggest that a reprimand will necessarily be the appropriate result

under the facts presented in a future case. We are persuaded, however, that in light of the mitigating factors identified by the panel in this case, the imposition of a reprimand is an appropriate exercise of the Board's overview function and is consistent with the goals of these discipline proceedings.

Reduction of Costs

MCR 9.128(A) provides, in pertinent part:

> The hearing panel and the Board in an order for discipline or an order granting or denying reinstatement must direct the attorney to reimburse the State Bar of Michigan for the expenses of that hearing, review and appeal if any.

At the conclusion of the panel proceedings, the Grievance Administrator submitted an itemized statement of expenses in accordance with MCR 9.128(A). In addition to the itemization of costs relating to service of process and associate counsel's travel to the hearing, the Administrator's itemized statement for $596.45 included a charge of $292.80 for the telephone depositions of Cindy and Gary O'Connell and $150.50 for a copy of a deposition taken of David O'Connell in Florida. In addition, the Attorney Discipline Board incurred court reporting and transcribing fees of $1060.45 for the panel hearings conducted in Lansing on August 26 and December 16, 1997.

Respondent argues that since he admitted the charge in paragraph 7(d) of the complaint when he filed his answer and, after two days of hearing, the Grievance Administrator was unable to establish the disputed charges of misconduct set forth in paragraph 7(a), (b), (c) and (e), it would be manifestly unfair for respondent to bear the full cost of those hearings.

The Grievance Administrator does not necessarily disagree and notes two prior matters in which a disciplined attorney was required to pay only a portion of the assessed costs. In Grievance Administrator v Kirby Wilson, 92-268-GA; 92-287-FA (ADB 1995), the Administrator filed a 12-count complaint. After days of

contentious hearings, the parties offered a stipulation for consent order of discipline in which respondent accepted a reprimand in exchange for the voluntary dismissal of 11 counts. The panel in that case accepted the stipulation and ordered that the respondent pay one-twelfth of the transcript costs, saying:

> We are not suggesting that it would be appropriate in every case involving two or more counts to allocate the costs to each count. However, this was not a normal case. It would fundamentally unfair to the respondent to assess costs against him in the amount of $4809.33 where these protracted proceedings resulted in the voluntary dismissal of 11 of the 12 counts against him. GA v Kirby Wilson, supra, HP Memorandum Opinion Regarding Costs, 1/31/95 p 2.

The Administrator also notes the matter of Grievance Administrator v Fried, 94-223-GA (ADB 1996) in which the Board affirmed a panel's dismissal of counts relating to respondent's handling of matters for two clients but reversed the panel's dismissal and found misconduct for respondent's neglect of the matters entrusted to him by a third client. On remand for a hearing on discipline, the parties stipulated to the entry of an order of discipline. The Board accepted the stipulation but ordered respondent to pay only one-third of the transcript costs incurred in the original proceedings.

In this case, we are persuaded that a reduction in the assessed costs would be appropriate. The Grievance Administrator's costs in connection with the depositions of Cindy, Gary and David O'Connell amounts to $443.30. We deduct that amount from the total costs of $1656.70 assessed by the hearing panel together with one-half of the hearing panel transcript costs ($530.13) leaving an assessment of costs of $683.28.

We emphasize that this modification of the assessed costs should not be interpreted in any way as a reflection on the Grievance Commission's decision to authorize and pursue the charges of misconduct in the formal complaint or on the reasonableness of the charges incurred. On the contrary, counsels' handling of this case prompted two panelists to remark on the record:

> And what struck me, among other things is the cooperation between counsel here on things like telephone depositions and stipulations and affidavits. That made this procedure go much more quickly and less expensive, certainly for you and for the Board, because the Board can utilize your services elsewhere, and this is something we see too little of, both in court and, as well, in this context, and I think you did a marvelous job.
>
> * * *
>
> [T]his was a very well tried case on both sides, and we talked about that. On both sides, very well prepared. No stone has been left unturned here, and it has been done very appropriately. The panel and Commission needs to be proud of the kind of work at least that was done in this case. [Tr. p 282, 284-85.]

The positions advanced by the Grievance Administrator were not without evidentiary support although, in the end, the hearing panel ruled that certain allegations had not been established by a preponderance of the evidence. In short, this reduction of costs should be viewed as neither a precedent in future cases nor a reflection on the good-faith prosecution by the Grievance Administrator and his staff.

Board Members Elizabeth N. Baker, C. H. Dudley, Barbara B. Gattorn, Grant J. Gruel, Albert L. Holtz, Michael R. Kramer, Kenneth L. Lewis and Nancy A. Wonch concur in this decision.

Board Member Roger E. Winkelman, dissenting:

I join my colleagues in granting respondent's request for a reduction in the assessed costs under the circumstances of this case. However, I would affirm the hearing panel's decision to impose a suspension of 60 days. The hearing panelists had a unique opportunity to observe and assess the demeanor and credibility of all the witnesses, including respondent. For this reason, the Board has traditionally deferred to hearing panels on issues of credibility. However, common sense tells us that the panel's opportunity to observe and assess the witnesses also plays a part

in a panel's decision with regard to discipline, a subjective determination at best.

I also believe that the suspension ordered by the panel properly reflected the gravity of respondent's misconduct. The record in this case does not support a conclusion that respondent intended to perpetrate a fraud or even that he intended to put his client, Thomas O'Connell, in a better position than the other three brothers who were also named as joint tenants in the quit claim deed. Based upon the record, respondent's conduct is easily characterized as simply an attempt to accommodate his client when he was told that Elizabeth O'Connell was ill and unable to come to the office to sign the deed. Nevertheless, this case illustrates why attorneys should scrupulously adhere to the highest standards in matters pertaining to the witnessing or notarizing of documents. The public, the courts and other lawyers all have a right to expect that a signature purportedly witnessed by an attorney was, in fact, witnessed by the attorney. The discipline imposed by the hearing panel was consistent with the specific goal of maintaining public confidence in the legal profession.