Grievance Administrator,

Petitioner/Cross-Appellant,

v

Mark S. Hamilton, P 31019,

Respondent/Appellant.

97-57-GA

Decided: June 12, 1998

BOARD OPINION

The hearing panel ordered that respondent's license to practice law in Michigan should be suspended for a period of ninety days based upon its findings that respondent failed to respond to demands for information made by the Attorney Grievance Commission and failed to assist the Commission in its investigation of two requests for investigation as set forth in counts 4 and 8 of the formal complaint. The panel found that the charges in counts 1, 2, 3, 5, 6 and 7 were not established by a preponderance of the evidence and those counts were dismissed.

Respondent petitioned for review on the grounds that the panel erred in its conclusions with regard to his cooperation with the Commission and that the level of discipline is excessive. The Grievance Administrator filed a cross-petition for review on the grounds that the panel erred in dismissing counts 1-3 and 5-7. The Grievance Administrator has requested increased discipline. For the reasons stated below, we reverse the hearing panel's dismissal of count 3. The decisions of the hearing panel with regard to the dismissal of counts 1, 2, 5, 6 and 7; the findings of misconduct with regard to counts 4 and 8 and the imposition of a suspension of ninety days are otherwise affirmed.

In reviewing a panel's findings, the Board is to determine whether those findings have proper evidentiary support in the whole record. State Bar Grievance Administrator v DelRio, 407 Mich 336, 349, 285 NW2d 277 (1979); In re Grimes, 414 Mich 483, 326 NW2d 380

(1982). During the hearing, a panel receives the evidence and has the opportunity to judge credibility by way of first-hand observation of the character and demeanor of the witnesses who testified before them. For that reason, the Board has traditionally afforded deference to the panel in matters of credibility. Grievance Administrator v Miller, 90-134-GA (1990); Grievance Administrator v Jackman, 189-87 (1987); Grievance Administrator v Walsh, DP 16/83 (1984). In this case, the panel heard conflicting testimony between respondent and the two complainants on such issues as the nature and frequency of the communications between attorney and client and alleged instructions from the clients to respondent. There is evidentiary support, including respondent's testimony, for the panel's findings as to counts 1, 2, 5, 6 and 7. Applying the required standard of review, we affirm dismissal of those counts.

Count 3 charged that respondent's billings to complainant Vonda Wieczorek in the amount of $14,200.50 for representation in a proceeding for separate maintenance, child custody and child support was clearly excessive under all of the circumstances and therefore constituted violations of provisions of the Michigan Rules of Professional Conduct including MRPC 1.5(a). That count also charged that respondent's billings to the complainant included charges for interest on the unpaid balance although respondent did not have his client's consent to charge interest.

The Board has generally taken the position that legal and factual issues presented in a legitimate fee dispute should be the subject of a civil proceeding or an arbitration conducted in accordance with MCR 9.130. Grievance Administrator v McCallum, 90-180-GA; 90-42-FA (1990). See also State Bar v Daggs, 384 Mich 729, 187 NW2d 227 91971). In this case, however, the record is bereft of evidentiary support for a conclusion that the claimed fees of $14,200.50 could be justified under any application of the factors which may be considered under MRPC 1.5(a).

In dismissing count 3, the panel stated:

> [J]udging from the size of the two files presented to us and the number of hearings attended, we do not find that such a fee is

> clearly excessive, and. . .the respondent did nothing to collect the fee, and knew at the time he was rendering her services that his client was virtually uncollectible and that he probably wasn't going to get paid for those services. (Panel Rept. 1/9/98, citing the panel's decision from the bench, Tr. p. 7-8).

We agree with the Grievance Administrator that the weight or thickness of the court file is not a reasonable basis for considering whether or not the claimed fee was reasonable. Many of the documents in the two circuit court files are documents which were generated by the Washtenaw County Friend of the Court in its efforts to enforce the temporary child support order. The record discloses that the only documents in those files prepared and filed by respondent are the complaint for separate maintenance; summons; motion for temporary support; default/affidavit; and answer to complaint for divorce.

Despite the panel's conclusion that respondent has not taken active measures to collect this fee, MRPC 1.5(a) is violated when a lawyer charges a clearly excessive fee regardless of the success or failure of the lawyer's subsequent attempts to collect those fees.

Count 3 of the complaint also charged that respondent engaged in professional misconduct by charging interest on the unpaid attorney fees without prior oral or written consent. Petitioner's Exhibit 3 is a bill from respondent's firm to Ms Wieczorek dated March 19, 1996 for past due fees in the amount of $14,200.50 plus unpaid interest of $1593.40. The billing statement discloses an annual percentage rate of 5%. Respondent offered no evidence to rebut Ms. Wieczorek's testimony that she did not authorize her to attorney charge interest on the unpaid balance.

The Michigan Rules of Professional Conduct contain no specific reference to the charging of interest on unpaid attorney fees and the practice is neither explicitly prohibited nor allowed under the rules charged in the formal complaint. Because this isue has not previously been addressed by the Board and was not briefed on appeal in this case, we decline to enter a separate finding of misconduct under count 3, paragraph 22(a) based upon the

unauthorized charging of interest. We note, however, that the Committee on Professional and Judicial Ethics of the State Bar of Michigan has consistently held that in the absence of a prior agreement, it is unethical for a lawyer to impose interest charges on the unpaid balance of a client's account. See Informal Ethics Opinions CI-77, CI-97, CI-191, CI-1106 and RI-40.[1]

Finally, we have considered the arguments of both parties concerning the appropriate level of discipline. Based upon our review of the whole record, we conclude that the hearing panel's decision to impose a ninety-day suspension was appropriate in light of respondent's persistent failure to comply with the Grievance Administrator's lawful demands for information which would assist the Attorney Grievance Commission in discharging its investigative functions. Our additional finding that respondent's charging of an excessive fee in violation of MRPC 1.5(a) as alleged in count 3, paragraph 22(b) does not necessarily require the imposition of greater discipline. The deterrent effect of a ninety-day suspension with the attendant notices to clients, tribunals and opposing counsel is not insignificant by any means and will, we trust, achieve the appropriate remedial effect in this case.

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

Board Member C. H. Dudley did not participate in this decision.

[1] For a full discussion of this topic see "Charging Interest On Unpaid Client Accounts" by Kyle Riem and Marcia L. Proctor, Michigan Bar Journal, Vol. 70, page 948 (1991).