Grievance Administrator,

v

Stephen C Moultrup, P 30869,

93-197-GA

Decided: September 27, 1995

BOARD OPINION

The Grievance Administrator and the respondent each filed a petition for review seeking modification of a hearing panel order of discipline. We have reviewed the record below and have considered the hearing panel's rationale for imposing a sixty-day suspension. We conclude that the discipline imposed was appropriate under the circumstances and that it should be affirmed.

While the parties have expressed strongly differing views on the nature and magnitude of the respondent's ethical lapses, the essential facts are not seriously disputed.

The respondent represented the husband in a contentious divorce action. During the divorce proceedings, the husband and wife were the sole owners of a corporation known as Plaza Beauty Supply, Inc. On April 18, 1990, a judgment of divorce was entered with a property settlement under which Plaza Beauty Supply, Inc. ultimately went to the wife.

For several years before divorce proceedings were instituted, the respondent's client had assumed the day-to-day management of two retail outlets and a warehouse, all operated under the Plaza Beauty Supply name. The wife managed two other retail outlets before the entry of the divorce judgment.

While operating the Plaza Beauty Supply warehouse, the respondent's client instituted a collection action and obtained a judgment in the amount of $2316.35 in a district court action entitled Plaza Beauty Supply v R & L Beauty Supply. The court record in that case (Petitioner's Exh. #1) contains evidence of the

respondent's representation of the husband/creditor as early as September 29, 1989. In September 1990, five months after the divorce judgment, the respondent received a $1700 cashiers' check made payable to himself and Plaza Beauty Supply in settlement of the collection case. The respondent deposited the settlement check in his general account. He retained $566.61 as his attorney fee and delivered the $1333.39 balance to his client. The client subsquently remitted the $1333.39 to the respondent in payment of attorney fees in other matters.

Respondent does not dispute that sole ownership of Plaza Beauty Supply was awarded to his client's former spouse. Respondent acknowledged that he did not advise the former wife or her counsel about the entry of a judgment or his receipt of a settlement check. He argues, however, that he believed that the collection case arose out of his client's personal management of the Plaza Beauty warehouse and that the judgment was therefore not an asset of the corporation.

We agree with the hearing panel that the respondent's purported belief that the collection case was a personal asset of his client was not reasonable. As the panel stated in its report on misconduct:

> The law suit was filed on behalf of Plaza Beauty. The appearance and garnishment were filed on behalf of Plaza Beauty. The check was written to Plaza Beauty. It is undisputed that Moultrup took these funds for himself at a time when he had no authority to represent Plaza Beauty. (H.P. Report 9/21/94, p. 4-5)

The Grievance Administrator's complaint charged that respondent's deposit of the settlement proceeds into his general account, rather than into a segregated trust account, constituted an improper commingling of client funds with his own in violation of Michigan Rules of Professional Conduct (MRPC) 1.15(a). Further, since neither respondent nor his client were entitled to any portion of the $1700 settlement check, the complaint alleges that respondent misappropriated those funds. At the separate hearing on

discipline under MCR 9.115(J)(2), the Grievance Administrator's counsel argued that respondent's misappropriation of funds belonging to a third person (the former spouse) warranted revocation of the respondent's license to practice law in Michigan.

The hearing panel's report on discipline focuses almost exclusively on the issue of whether respondent intentionally misappropriated funds to which neither he nor his client had a legitimate claim. The panel concluded that respondent was mistaken or misguided but that his mishandling of funds did not rise to a level of intentional embezzlement.

The panel stated:

> The panel credits that, based on respondent's view of the situation, he did not intentionally misappropriate funds. However, the panel is concerned that even after a review of the basis for our finding, and even after completing the hearing, respondent did not appear to fully understand why what he had done was wrong.
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> For this reason, the panel believes a suspension of sixty days is appropriate. During the period of suspension, the panel suggests that respondent review his attitude toward the practice of law. We are members of a profession, with a unique duty, not only to benefit our clients, but to maintain a responsibility toward the public and to the integrity of the judicial system as well. Respondent has the ability and the intelligence to be a vital, contributing member of this profession. Whether he considered this suspension as a "wake-up call" or as an invitation to leave the profession, is a decision we hope he makes with an awareness that, should be return to the practice, he will have to demonstrate an understanding of the sensitive balance of the responsibility which the best lawyers must demonstrate. (Panel Report on Discipline, p. 2-3).

In reviewing a hearing panel's findings and conclusions, the Board must determine whether those findings have proper evidentiary support in the whole record. Grievance Administrator v August, 438

Mich 296, 304 (1991). In re Daggs, 411 Mich 304, 318-319 (1981). Applying that standard of review, we conclude that there is adequate evidentiary support for the panel's conclusion that the respondent's handling of the settlement check was based upon a sincere, albeit misguided, belief that his client was entitled to the settlement obtained in the name of Plaza Beauty Supply.

However, the Board is also concerned by the issue presented in Count II of the complaint, that is, the respondent's apparent lack of candor toward his client's spouse and her counsel in failing to disclose the existence of the law suit against R & L Beauty Supply prior to the entry of the divorce judgment or his receipt of funds in the name of Plaza Beauty Supply after the corporate assets had been awarded to the wife.

The respondent explained to the panel:

> Now as to Count II, what it indicates in paragraph 22A is that I have an obligation to be truthful and candid in my statements to my client or my clients representatives. What I say to this panel is that I, in fact, did not represent Ms Brown or Plaza Beauty Supply. I represented Ronald Brown. Therefore, I had no obligation to be truthful and candid to Ms Brown regarding this matter because she was not my client. (emphasis added) (Hrg. 5/2/94, Tr. 15)

This statement demonstrates a profound misunderstanding of a lawyer's obligation to be truthful. MCR 9.104(3) does not limit this obligation to a lawyer's dealings with a client. Neither does MRPC 8.4(b) limit the prohibition against conduct involving dishonesty or misrepresentation. In Matter of Grimes, 414 Mich 483 (1982), the Supreme Court emphasized the responsibility of all members of the bar to carry out their public and private activities with circumspection, quoting:

> The concept of unprofessional conduct now embraces a broader scope and includes conduct outside the narrow confines of a strictly professional relationship that an attorney has with the court, with another attorney or a client. State v Postorino, 53 WI2d 412, 419; 193 NW2d 1 (1972).

The fashioning of a discipline order is, at best, an inexact science requiring careful consideration of the unique circumstances of each case. In this case, the hearing panel's decision to impose a sixty-day suspension included the panel members' evaluation of the respondent's demeanor and credibility and their ultimate assessment of his character. We have carefully weighed the evidentiary support for this assessment. We agree that the level of discipline may, under some circumstances, take into account the respondent's underlying belief that he was acting in the best interests of his client.

Like the hearing panel, we are troubled by the respondent's apparent insensitivity to the balance which a lawyer must strike between the interests of a client and the obligations embodied in the rules of professional conduct. Future transgressions of a similar nature by this attorney could result in substantially increased discipline. Nevertheless, for the reasons expressed by the hearing panel, we affirm the suspension of sixty days.

Board Members John F Burns, George E Bushnell, Jr, C Beth DunCombe, Elaine Fieldman, Barbara B Gattorn, Miles A Hurwitz and Paul D Newman concur.

Board Member Albert L Holtz would decrease discipline to a reprimand.

Board Member Marie Farrell-Donaldson did not participate.