

Grievance Administrator,  
State of Michigan  
Attorney Grievance Commission,

Petitioner/Appellant,

v

Eleanor C. Smith, P-29738,

Respondent/Appellee.

Case Nos. 92-71-GA; 92-103-FA

Decided: October 28, 1994

BOARD OPINION

The Grievance Administrator filed a Petition for Review of a hearing panel Order of Reprimand with Conditions. That order was based upon Tri-County Hearing Panel #75's finding that respondent willfully disregarded orders of the Wayne County Probate Court directing her to return certain attorney fees taken from a probate estate without proper court authority. We have considered the willful nature of the misconduct, as well as respondent's prior discipline, and conclude that the hearing panel Order of Reprimand with Conditions should be increased to a suspension of thirty days.

Respondent was retained in June 1988 to prepare and file a petition for appointment of a guardian and conservator for an incapacitated person. Respondent filed the necessary petitions and the estate was opened in Wayne County Probate Court. In October 1989, the respondent prepared and filed a first annual account which included a claim for attorney fees in the amount of \$4032.50. The record establishes that at the time the account was filed, those fees had already been paid to the respondent from estate funds.

At a hearing in December 1989, the Probate Court disallowed the first annual account and adjourned the matter until February 1990 with instructions to the respondent that she prepare and file a statement of the legal services rendered in support of her request for fees. The respondent did not appear at the February 14, 1990 hearing. At that hearing, the Court disallowed the attorney fees requested by the respondent. In April 1990, the Probate Court entered an order allowing an amended first annual account filed by the fiduciary and denying the attorney fees requested by the respondent.

In June 1990, successor counsel for the estate sent a written demand to the respondent for return of the attorney fees which had

been disallowed by the Court. That demand was followed by a petition in October 1990 requesting that the Court enter an order

requiring the respondent to return the fees to the estate. At the hearing on that motion in November 1990, the respondent filed a summary of services in support of her claim for attorney fees. On July 10, 1991, the Probate Court issued an order to the respondent directing her to pay the sum of \$2182.50 to the conservator on or before August 8, 1991 with a further provision that in the event that amount was not paid by August 8, 1991, respondent was to pay the full amount of \$4182.50 to the conservator of the estate "forthwith". As of the date of the filing of the formal complaint, March 23, 1992, the respondent had not complied with the Court's order directing repayment of attorney fees to the estate.

The hearing panel concluded that the respondent's failure to comply with the order of the Court together with her failure to file a memorandum of legal services in support of her attorney fees and for her failure to appear for the hearing in February 1990 constituted violations of MCR 9.104(1-4) and Michigan Rules of Professional Conduct 1.1(c), 1.3, 3.4(c) and 8.4(a,c).

Following a separate hearing to determine the appropriate level of discipline, the panel ordered that respondent should be reprimanded with conditions requiring that she read materials and probate court rules regarding attorney fees and that she file an affidavit affirming that she would comply with those rules in the future.

Unlike such categories as "misappropriation of client funds" or "failure to answer a Request for Investigation" in which the misconduct is clearly defined and the Board has reviewed a relatively large number of cases, there are relatively few cases which have come before the Board under the classification of "failure to comply with a court order". Furthermore, prior cases involving failure to comply with a court order have often involved a larger pattern of misconduct.

In this case, notwithstanding the general allegations of neglect in handling of a probate case, the Grievance Administrator's request for increased discipline is based primarily upon the respondent's failure to comply with an order of the probate court directing her to return the sum of \$4182.50 to an estate. In February 1990, the respondent failed to file a detailed statement and failed to appear for a hearing on the issue of her fees. Orders were issued in April 1990 and July 1991 disallowing the fees and directing her to return the funds to the estate. The respondent took no action to appeal those orders until May 1992. That petition for allowance for attorney fees was dismissed as "frivolous". Although the fees in question were placed in escrow during a portion of these discipline proceedings, they were not returned to the estate until January 1994.

While respondent's counsel characterizes the misconduct in this case as simple "acts of omission", it is clear that there was

an element of willfulness in the respondent's failure to deliver the funds. The respondent refused to do something she was ordered to do.

The panel members apparently believed that the willful nature of the respondent's conduct warranted a suspension, when considered in the abstract, but declined to order suspension because of personal, professional and financial hardships that a suspension would have on respondent. The panel chairman stated:

We feel that this decision has come upon us very difficultly because of what appeared to us to be an absolute refusal to obey an order of the court that could have avoided all of this . . . and we feel that, although it may very well be an abuse of the system of the legal process, it was not such that caused great harm or injury to anyone. (T 315-316)

Another panel member stated on the record:

I will tell you, Ms. Smith, I believe that you knowingly violated a court order, and had it not been for the fact that a suspension would have ruined your practice . . . I would have voted for a suspension. (T 317)

There are several aggravating factors present in this case. Respondent was the subject of prior discipline, a 1989 reprimand for neglect and misrepresentation in connection with a divorce matter. Respondent failed to acknowledge the wrongful nature of her conduct and exhibited indifference to her duty to repay the money to the estate.

Respondent's conduct was willful. Her disregard for the orders of the court, failure to acknowledge the wrongful nature of her conduct, and failure to return the funds for four years warrant a suspension. The Board concludes that a thirty-day suspension is appropriate.

Board Members John F. Burns, George E. Bushnell, Jr., C. Beth DunCombe, Elaine Fieldman, Barbara B. Gattorn, Albert L. Holtz, Linda S. Hotchkiss, M.D. and Miles A. Hurwitz concur.

Board Member Marie Farrell-Donaldson was absent and did not participate.