

Grievance Administrator,
State of Michigan
Attorney Grievance Commission,

Petitioner/Appellant,

v

Walter F. Finan, Jr., P 25711,

Respondent/Cross-Appellant.

Case No. 92-65-GA

Issued: June 24, 1993

MAJORITY BOARD OPINION

After receiving a substantial attorney fee in a wrongful death case, the respondent gave money described as "gifts" or "loans" to the non-lawyer who had recommended the client to the respondent. The hearing panel concluded that the respondent's conduct violated Michigan Rule of Professional Conduct 7.2(c) [a lawyer shall not give anything of value to a person for recommending the lawyer's services]. The panel also found that the respondent's answer to the Request for Investigation was deliberately false.

The Grievance Administrator and the respondent have each filed a petition for review of the hearing panel's Order of Reprimand. The respondent urges reversal on the grounds that the panel's findings are without adequate evidentiary support and that the panel erred in its conclusion that the respondent's conduct violated the cited provisions of the Code of Professional Responsibility or the Rules of Professional Conduct. The Grievance Administrator seeks an increase in discipline in light of the nature of the misconduct.

Based upon a review of the whole record, the Board concludes that the hearing panel's findings and conclusions with regard to the misconduct alleged in Count I of the Formal Complaint have sufficient evidentiary support. Evidentiary support is lacking, however, for the allegations of misconduct in Count II that certain statements in the respondent's answer were known to be false and were material misrepresentations made "with intent to fraudulently induce the Attorney Grievance Commission to dismiss the Request for Investigation". Evidence that those statements were made with fraudulent intent is absent in the record below.

The Board has considered the factors bearing upon the appropriate level of discipline and has concluded that the hearing panel's decision to impose a reprimand was not erroneous under the circumstances.

This two-count complaint was filed March 19, 1992. Count I charges that the respondent entered into an agreement in 1984 under which he would compensate the complainant, Willie Silas, for referring individuals in need of legal services. The complaint specifically identifies seven checks given by the respondent to Silas between May 1988 and October 1989 in amounts ranging from \$15 to \$2500. The total amount of these checks is \$3515. The complaint alleged that delivery of these checks constituted professional misconduct in violation of MCR 9.104(1-4); Canons 1, 2 and 3 of then applicable Code of Professional Responsibility: DR 1-102(A)(1,3-6); DR 2-103(B); DR 2-103(C); DR 3-102(A) and the Michigan Rules of Professional Conduct, MRPC 1.8(e); 7.2(c) and 8.4(a-c).

Respondent's answer to the Request for Investigation filed by Willie Silas stated that ". . . out of sympathy for Mr. Silas (and not without a sense of gratitude), respondent loaned Mr. Silas a total of \$3015 by several checks over a period of approximately one and one-half years". The complaint charged that the respondent's answer was deliberately false and was made "with intent to fraudulently induce the Attorney Grievance Commission to dismiss the Request for Investigation".

The respondent's answer to the formal complaint denied those allegations in the complaint. At the hearing before a hearing panel, the Grievance Administrator presented the testimony of the respondent, Willie Silas and Ida Washington, the client allegedly referred to the respondent by Silas.

Although the testimony of Willie Silas was, as respondent points out, contradictory and confusing, certain essential facts are not in dispute.

After meeting Willie Silas, respondent gave him a number of business cards with the expectation that Silas would hand them out to persons in need of legal services. It is undisputed that Ida Washington, who had retained another law firm to file a wrongful death claim against a Detroit hospital, was "referred" to the respondent by Silas. Willie Silas testified that he specifically recommended the respondent. Mrs. Washington testified that when she told Silas that she was dissatisfied with the law firm then handling her case, he gave her business cards of four different lawyers, including the respondent.

The respondent, Mrs. Washington and Mr. Silas all agree that Mr. Silas was present at Ida Washington's apartment when she signed a contingent fee agreement with the respondent in 1986. There is no corroboration, however, for Silas' claim that he and the respondent entered into a specific verbal agreement that respondent would pay Silas thirteen percent of any amount eventually recovered on behalf of Ida Washington.

In March 1988, Mrs. Washington's case was settled. The value of the structured settlement was in excess of one million dollars, with a present value of approximately \$850,000. The respondent's fee eventually totaled approximately \$250,000.

It is undisputed that the respondent issued two checks to Silas in May 1988 in the amounts of \$250 and \$50. Checks in the amount of \$100 each were given to Silas in July and October 1988. A \$500 check was delivered in October 1988 and a \$2500 check was given to Silas in December 1988. The last check, in the amount of \$15 was given to Silas by the respondent in October 1989.

It is the respondent's position that he gave money to Silas for investigative services, that he loaned money to Silas because he was "down on his luck", and that some money

was given simply as a gift. The respondent readily concedes that there was an element of "gratitude" to Silas for steering a highly remunerative case to him. The respondent absolutely denies any specific referral fee arrangement, however.

The testimony of Mr. Silas was inconsistent. It is difficult to reconcile his testimony that the payments from the respondent were unsolicited gifts and his claim that the respondent knew and understood that Silas expected a percentage of the respondent's legal fee in the Washington case.

It is not necessary for the Board to reconcile those inconsistencies. The standard of review to be employed is whether the hearing panel's findings have adequate support in the whole record. Grievance Administrator v Irving August, 438 Mich 296; 475 NW2d 256 (1991). There is sufficient evidentiary support for the hearing panel's conclusion that respondent's conduct violated Rule 7.2(c) of the Michigan Rules of Professional Conduct.

Nor is it necessary to conclude that there was a specific agreement for the payment of a referral fee equal to thirteen percent of the respondent's eventual attorney fee and, in fact, we do not believe that there was credible evidence in the record in support of that claim.

MRPC 7.2(c) states:

(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may:

(i) pay the reasonable cost of advertising or communication permitted by this rule;

(ii) participate in, and pay the usual charges of, a not-for-profit lawyer referral service or other legal service organization that satisfies the requirement of Rule 6.3(b); and,

(iii) pay for a law practice in accordance with Rule 1.17.

By his own testimony, the respondent conceded that he was grateful to Willie Silas for recommending Ida Washington's case to him and that gratitude was a factor in his decision to pay money to Silas. This testimony, in the context of the undisputed testimony that the respondent made no "gifts" or "loans" to Willie Silas until a few months after the settlement of Mrs. Washington's case, provides ample evidentiary support for the panel's conclusion that the respondent did, in fact, make those payments to Silas in violation of MRPC 7.2(c).¹

¹ The Supreme Court has cautioned that "review of these proceedings is best handled on a case-by-case basis." Grievance Administrator v Nickels, 422 Mich 254 (1985). While the prohibitions of MRPC 7.2(c) are applicable to the conduct which has been established in this case, an attorney or law firm does not necessarily violate MRPC 7.2(c) by giving something of value to a person who may have recommended the lawyer's services where the recommendation was not made with any express or implied promise or expectation of compensation and there was no quid pro

The Charge of Fraudulent Intent

Proper evidentiary support is not present for the allegations of misconduct in Count II of the complaint. The complaint charged that statements in the respondent's answer to the Request for Investigation were known to be false by the respondent and were material misrepresentations made "with the intent to fraudulently induce the Attorney Grievance Commission to dismiss the Request for Investigation".

There is no support in the record for a conclusion that the respondent made knowing, material misrepresentations with a "fraudulent intent" to deceive. Neither the Request for Investigation nor the respondent's answer were introduced into evidence. The only evidence as to the respondent's intent at the time he filed his answer is the respondent's own testimony to the hearing panel. Without any other evidence on this issue, the record does not support a conclusion as to the respondent's intent, fraudulent or otherwise, at the time he filed his answer to the Request for Investigation.

Level of Discipline

The hearing panel concluded that a reprimand was appropriate under the circumstances. The Board is not persuaded that the discipline imposed by the panel is clearly insufficient.

This case is, as the parties point out, essentially a case of first impression in Michigan. Nevertheless, aside from such argumentative statements that the respondent's conduct was "horrendous" and that the discipline imposed was "ludicrous", no authority has been cited in support of the proposition that an attorney who makes a gift to a person who has referred a case must, in every instance, be suspended.

In a case with credible evidence of a specific agreement by a respondent to pay a referral fee based upon a percentage of the attorney fee, we may well conclude that such a conscious decision to violate the standard of conduct embodied in MRPC 7.2 warrants a suspension from the practice of law. Similarly, a suspension could be appropriate in a case involving a repeated pattern of so-called "gifts". Those factors are not present here. We have also considered the mitigating effect of the respondent's prior unblemished record. Under the specific circumstances of this case, we decline to modify the hearing panel Order of Reprimand.

quo arrangement. We are not prepared to say, for example, that an attorney or law firm violates MRPC 7.2(c) by entertaining clients who may have, incidentally, recommended the attorney's services to others. That situation is readily distinguishable from the respondent's conduct in this case. The clearly signaled expectation of Silas that he would be rewarded in some way for recommending respondent's services and the respondent's payments of cash to Silas after the successful resolution of the case were properly considered by the panel in finding a violation of MRPC 7.2(c).

John F. Burns, Elaine Fieldman, Linda S. Hotchkiss, M.D., Miles A. Hurwitz and Theodore P. Zegouras.

DISSENTING OPINION

George E. Bushnell, Jr.

I fully agree with the conclusion of the majority that the charges in Count II of the complaint are without evidentiary support. I am inclined to agree with the argument propounded by the respondent in his brief that:

"There is something fundamentally unfair, even draconian, in the notion that any defense that fails to prevail is therefore a basis for a separate finding of misrepresentation . . ." (Respondent's Brief in Support of Petition for Review, p. 13).

I strongly disagree with my colleagues, however, in the decision to affirm the level of discipline imposed by the panel. Rule 7.2(c) of the Rules of Professional Conduct is merely the most recent embodiment of a long-standing prohibition against solicitation of clients, whether in person or through the employment of others to recommend a lawyer's services. That fundamental prohibition is neither novel nor arcane. This respondent knew or should have known that it is improper to give cash rewards to an individual out of gratitude for recommending his services. Characterization of such payments as "loans" or as "gifts" is of no great moment in this case. The record discloses no significant professional or social relationship between the respondent and Mr. Silas. The respondent expected Mr. Silas to recommend his services to others. Mr. Silas expected monetary reward for making those recommendations. Upon the conclusion of a particularly remunerative case steered to the respondent through the efforts of Silas, checks totaling approximately \$3500 were delivered from the respondent to Silas. That is precisely the conduct which MRPC 7.2(c) prohibits and the willful violation of that rule warrants a suspension.