STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,
State of Michigan
Attorney Grievance Commission,

Petitioner/Appellant,

v

Philip H. Weaver, P 22062,

Respondent/Appellee.

Case No. 91-69-GA

Decided: February 25, 1992

BOARD OPINION

The complaint in this case charged in Count I that the respondent received funds on behalf of a client but failed to deposit those funds in a separate trust account as required by the provisions of Rule 1.15 of the Michigan Rules of Professional Conduct. The second count charged that the respondent violated his duty to be truthful with his client by falsely advising that he had not received a child-support check on her behalf. In its report, the hearing panel concluded that the evidence presented did not establish a misrepresentation to a client as alleged in Count II. As to the charge in Count I that the respondent mishandled client funds, the panel concluded that the funds in question were deposited into the respondent's business account under a good-faith belief that he was entitled to apply those funds to his claim for legal fees. The panel expressed its opinion that "Respondent's violation of the Michigan Rules of Professional Conduct was an isolated instance of ordinary negligence of a de minibus nature not sufficient to warrant disciplinary action".

The Grievance Administrator has filed a petition for review seeking reversal of the hearing panel's decision to dismiss the complaint. Based upon its review of the whole record, the Board finds that it has been established that the respondent failed to deposit funds of a client into a separate trust account and that his failure to do so constituted a violation of Rule 1.15(a) of the Michigan Rules of Professional Conduct. The hearing panel's dismissal of Count I is therefore reversed. The Board is satisfied that the imposition of a reprimand will achieve the goals of the disciplinary process.

The evidence presented in support of Count I of the complaint is not in dispute. The following statement of facts is taken directly from the respondent's brief filed with the Board:

> "Respondent, Philip H. Weaver, was retained to represent Mary Gorzenski in a divorce proceeding. After the commencement of the complaint for divorce, the trial court entered a

> temporary support order on January 8, 1990 requiring Mary Gorzenski's husband to pay $103.00 per week child support.
>
> On January 30, 1990, respondent Philip Weaver, received a check made payable to Philip H. Weaver, Esquire in the amount of $206.00. On the face of the check was the notation that it was for 'temp child support'. This check was deposited into the office account of Philip H. Weaver on January 30, 1990 with proper endorsement and on that same date (January 30, 1990) a letter was dictated to Mary Gorzenski advising her that he had received $206.00 and that same had been deposited in Mr. Weaver's office account and applied to the substantial balance owing by Mary Gorzenski for services rendered. This letter was typed and mailed the following day."

Rule 1.15(a) of the Michigan Rules of Professional Conduct (MRPC) provides in pertinent part:

> "Unless the client directs otherwise, all funds of the client paid to a lawyer or law firm other than advances for costs and expenses, shall be deposited in an interest-bearing account in one or more identifiable banks, savings and loan associations or credit unions maintained in the state in which the law office is situated, and no funds belonging to the lawyer or the law firm shall be deposited therein except as provided in this rule."

The hearing panel properly concluded that the check for temporary child support represented "funds of the client paid to a lawyer" within the meaning of MRPC 1.15(a). The respondent has relied heavily upon his argument that upon depositing the check in his general account, he immediately prepared a statement for legal services and placed it in the mail the day after he received the check. It is undisputed, however, that at the time he unilaterally applied the check toward his legal fees, he had not yet sent any statement for services to the client. At that point, the respondent had not notified his client of his claim of interest in the funds and there was not yet any dispute regarding his fees. Had there been such a dispute, the respondent's obligation was spelled out in MRPC in 1.15(c) which directs:

> "When in the course of representation a lawyer is in possession of property in which the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved".

On the day the respondent received a check on behalf of his client for temporary child support, MRPC 1.15 allowed only two courses of action. He could either: 1) distribute the funds to his client; or, 2) maintain the funds in his trust account until he had permission from the client to apply the funds to his fees. That rule does not allow an attorney to take the funds first and then ask permission.

In his brief, the respondent cites Haskins v Bell, 373 Mich 389 (1964) as authority for the right of an attorney to retain client funds to secure a fee so long as the money is retained in good faith. The language cited in that case is from an 1885 opinion, Robinson v Hawes, 56 Mich 135, 139. We agree with the panel's conclusion that the language cited in Robinson v Hawes, is not applicable in this case. When he received the check, respondent had not yet billed his client and there was no fee conflict. Furthermore, since issuing that opinion in 1885, the Supreme Court has specifically addressed an attorney's duties upon receipt of client funds in Canon 9, DR 9-102 of the Code of Professional Responsibility, adopted October 4, 1971 and MRPC 1.15, effective October 1, 1988. Rule 1.15 is unambiguous and does not contain a "good-faith" exception.

The hearing panel below found that while the respondent may have violated his professional obligations, It was the result of -Poor judgment, even to the point of being categorized as ordinary negligence". However, the Board has ruled that misappropriation is a per se offense. See, for example, Matter of Robert R. Cummins, ADB 159/88, Brd. Opn. 12/5/88 and Matter of Steven J. Lupiloff, DP 34/85, Brd. Opn. 3/24/88. In Lupiloff, the Board cited with approval a definition of misappropriation employed by the District of Columbia Court of Appeals in the matter of In re: E. David Harrison, 461 AT2d 1034 (1983):

> "Misappropriation of clients' funds is any authorized use of clients' funds entrusted to an attorney including not only stealing, but also unauthorized temporary use for the lawyer's own purpose, whether or not he derives any personally gain or benefit therefrom."

We hasten to emphasize that the respondent's conduct in this case was not characterized by the malevolence associated with acts of theft or embezzlement. Indeed, there is ample evidentiary support in the record for the panel's conclusion that the respondent did not act out of bad faith. The panel found, for example, that the respondent notified his client within twenty-four hours that he had received the check and that he had applied it to his claim for legal fees. Such factors are appropriately considered in mitigation and we are persuaded in this case that the absence of bad faith warrants the imposition of a reprimand.

The panel's dismissal of Count 11, charging a misrepresentation to the client, was not specifically addressed in the Grievance Administrator's brief. We find ample evidentiary support for the panel's decision to dismiss that count.

Finally, the Board has considered whether or not the respondent's misapplication of the check for $206 received on his client's behalf on January 30, 1990 requires that restitution be made to the client in that amount. We conclude that restitution in that amount is appropriate.

George E. Bushnell, Jr., Linda S. Hotchkiss, M.D., Miles A. Hurwitz and Theodore P. Zegouras

DISSENTING OPINION

We concur in the opinion of the Board with regard to the respondent's violation of the applicable provisions of MRPC 1.15 and we agree that a reprimand is the appropriate sanction. We disagree, however, with the majority decision to order restitution by the respondent to his former client in the amount of $206.00. The record in this case is quite clear that the respondent instituted suit against Ms. Gorzenski for his unpaid legal fees. Under cross-examination, the complainant acknowledged that she was sued by Mr. Weaver, that a trial was conducted and that a judgment was entered in favor of the respondent.

By entering a finding of professional misconduct and imposing a public order of reprimand, the Board has discharged its duty to the public, the courts and the legal profession. While Michigan Court Rule 9.106 authorizes the Board or a panel to impose an additional condition of restitution to satisfy a specific obligation to a client who has been injured by an attorney's conduct, it is clear from the record in this case that the monetary obligations between the respondent and his former client have been adjudicated in a civil court. The Board' s order to the respondent that he now remit the sum of $206-00 to the complainant constitutes, in our view, an unwise and unwarranted action.

John F. Burns, C. Beth DunCombe and Elaine Fieldman