STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,
State of Michigan
Attorney Grievance Commission,

Petitioner/Appellee,

Glenda McNett,

Complainant/Appellant,

v

Steven Mazzetti, P 29776,

Respondent/Cross-Appellant.

Case No. 90-60-GA

Decided: August 1, 1991

MAJORITY BOARD OPINION

John F. Burns, George E. Bushnell, Jr.. Elaine Fieldman, Remona A. Green, Linda S. Hotchkiss, M.D.

The respondent's license to practice law in Michigan was suspended for two years-eleven months by a hearing panel which considered his admissions that he neglected a probate matter, forged two letters from another attorney and delivered to his client a purported order from the Oakland County Probate Court when he knew that such an order had not been issued by the Court. A petition for review was filed by the complainant seeking increased discipline. A cross-petition for review was filed by the respondent asking that the suspension be made retroactive to the date he voluntarily ceased the practice of law. The Grievance Administrator has opposed the respondent's request for modification of the effective date of the suspension. The Attorney Discipline Board has considered the whole record and has concluded that the discipline imposed by the hearing panel should be affirmed with an additional condition imposed in accordance with MCR 9.106 that the respondent's eligibility to file a petition for reinstatement be conditioned upon the filing of a medical report regarding his medical and psychological fitness to resume the practice of law at the time he seeks reinstatement.

The respondent, who was licensed to practice law in Michigan in 1979, was retained to handle the commencement and administration of a decedent's estate in January 1985. He also agreed to refer certain records

to another attorney for the evaluation of a possible medical malpractice claim. The respondent has admitted that he failed to take prompt action to open the estate and he failed to make the referral to the other lawyer. To conceal his inaction, he provided his client with two letters, purportedly from another lawyer, which stated that the medical records had been reviewed and that there was no basis for a malpractice claim. In response to his client's inquiries regarding the probate estate, the respondent gave his client what appeared to be an order from the Oakland County Probate Court appointing his client as personal representative. The record in this case clearly discloses that no such order had been entered and that, in fact, he did not take action to open the estate until 1988.

Based upon those admissions, the only issue before the hearing panel was the appropriate level of discipline which should be imposed. In making its decision, the panel had an opportunity to hear and consider the respondent's own testimony regarding his inability to deal with this file, the pressures of a heavy case load, the devastating effect of this incident on his professional and personal life, and his acceptance of responsibility for his misconduct. The panel also received the testimony and written report of the psychologist with whom the respondent treated beginning in August 1989 as well as the report from a second psychologist.

In two relatively recent cases, the Board has considered the incalculable harm to the public and the legal profession which results from an attorney's preparation of false documents.

In Matter of Mary E. Gerisch, ADB 171-87; 197-87 (Brd. Opn. 4/28/88) the Board increased a three-year suspension to disbarment where an attorney falsely represented to her client that a case had been settled and, in support of the deception, provided fabricated copies of a settlement check and a settlement agreement. In that opinion, the Board noted:

> "Our legal system depends, in large part, upon the assumption that lawyers, as officers of the court, are telling the truth when they make statements about the cases they are handling. An attorney who creates forged pleadings or documents not only destroys the trust of the client but does incalculable harm to the legal system. Clients, court officers and other lawyers who receive pleadings or documents from a lawyer should never have to question the documents authenticity . . . we believe that revocation of that license is an appropriate sanction when an attorney violates the fundamental obligation to be truthful. This would seem to be especially true when a deliberate calculated intent to deceive is evidenced by the preparation of a forged document".

In Matter of Leo C. Gilhool, ADB 155-88 (Brd. Opn. 6/28/89) the Board increased a suspension of nine months to a four-year suspension in a case involving an attorney's false assurances to his client that a

workers' compensation case had been filed and settled. In that case, .settlement" documents were presented to the client for signature when, in fact, no case was pending. The respondent's misconduct in that case was aggravated by a prior reprimand.

The Board's opinions in Matter of Mary E. Gerisch, and Matter of Leo C. Gilhool were presented to the hearing panel for consideration along with other cases cited by both parties. Unlike the respondent in Gerisch, who failed to appear before the panel or the Board and failed to submit any evidence having a mitigating effect, respondent Mazzetti presented competent testimony having a mitigating effect and the panel was entitled to consider its weight. The Board is not prepared to find that the hearing panel erred in imposing suspension of two years-eleven months.

The hearing panel's order, filed February 6, 1991, specifically directed that the suspension of two years-eleven months be deemed effective on July 12, 1990, the date the hearing was conducted before the panel. Although the respondent has not appealed the length of the suspension, he has asked that a modification be made to the panel's order by imposing the suspension retroactive to July 17, 1989--the date he alleges that he voluntarily ceased the practice of law. As a general rule, retroactive orders of discipline are looked upon with disfavor by the Board, especially if the date proposed is prior to the date of the attorney's actual suspension from the practice of law, for disciplinary or nondisciplinary reasons, as the result of an order of discipline or the automatic operation of a court rule. In this case, the Board declines to grant the retroactive application requested by the respondent. There is simply no evidence in the record which would suggest that the hearing panel was unaware of the consequences of the suspension order which it entered.

MCR 9.106(2) authorizes a hearing panel or the Board to impose a suspension from the practice of law for a specified term with additional conditions relevant to the established misconduct. Under its power to amend the hearing panel order, the Discipline Board has concluded that the record in this case warrants the inclusion of such a condition. In addition to the reinstatement requirements set forth in MCR 9.123(B) and MCR 9.124, respondent's eligibility to file a petition for reinstatement will be conditioned upon his filing of a report by a psychiatrist addressing the issue of his medical and psychological fitness to resume the practice of law. This report should be filed by a psychiatrist who is mutually acceptable to the respondent and the Grievance Administrator and the report should be based upon an examination conducted no more than sixty days prior to the respondent's filing of a petition for reinstatement.

DISSENTING OPINION

Hanley M. Gurwin

I respectfully dissent from the opinion filed by the majority of the Board in this case - I would increase discipline to a revocation of the respondent's license to practice law.

In reviewing the hearing panel's decision, it is worth noting that a suspension of two years-eleven months was initially submitted to a hearing panel by the respondent and the Grievance Administrator in the form of a stipulation for consent order of discipline filed in accordance with MCR 9.115(F)(5). That panel declined to accept the proposal, noting in a Memorandum Opinion the extreme gravity of misconduct alleged. The panel concluded that:

> "Imposition of discipline of less than disbarment in this case should be supported by a public record and a written report from a hearing panel or the Attorney Discipline Board explaining to the public and the other members of the legal profession the basis for the decision. We are not able to endorse a proposal in which one of the most egregious forms of attorney misconduct is sanctioned by the imposition of discipline well below revocation and below the level which would require recertification by the Board of Law Examiners without such a record". Memorandum Opinion (5/22/90)

The complaint was then assigned to a new hearing panel which accepted the respondent's admissions to the charges of misconduct and proceeded directly to a hearing on discipline. The first panel's consideration and rejection of the stipulation was not disclosed to the hearing panel which imposed discipline. The panel was advised, however, that the respondent requested a suspension of no more than two years-eleven months and that the Attorney Grievance Commission had no objection to that level of discipline.

I agree completely with the sentiments of Tri-County Hearing Panel #25 as expressed in their Memorandum Opinion rejecting the proposal for consent discipline submitted by the parties. I do not believe that either the panel's report or the majority opinion of the Board contains an adequate explanation to the public and the legal profession for the decision to impose a suspension of less than three years for an attorney whose misrepresentations to his client included the preparation of forged letters, purportedly from another attorney, and the deliberate forgery of a court document.

Through the reports from his doctors and his own testimony, the respondent does not emerge as an evil person. Indeed, elements of genuine tragedy are present in this case. As difficult as it may sometimes be, however, our decisions to impose discipline must be guided by the standard announced by our Supreme Court:

> "Regardless of our feelings of sympathy for a disbarred attorney, our paramount concern must always be to safeguard the public". In Matter of Trombly, 398 Mich 377, 382; 247 NWd 873 (1976)

I believe that protection of the public through the imposition of discipline for attorney misconduct must rest on a recognition that the public and the legal profession have a right to know that certain types of misconduct will not be tolerated. Any list of these acts, which amounts to the legal profession's capital offenses, must surely include conviction of felonies involving moral turpitude, the deliberate embezzlement of client funds and the deliberate preparation of false documents.

In prior cases considered by the Board, I have expressed my view that confidence in the legal profession in matters of personal integrity and trust demands our assurance, on a consistent basis, that those who steal clients' money will not be welcome in our profession. Surely, the attorney who deliberately falsifies a document for the purpose of deceiving a client should be subject to the same standard.

A suspension for a fixed period announces that the errant attorney remains a licensed member of the profession who has been temporarily deprived of the use of that license. Arguably, a suspension carries with it the expectation that the suspended lawyer will be reinstated. An order of revocation, on the other hand, signifies a determination that the person is no longer entitled to hold the license to practice law which is a ..continuing proclamation by the Supreme Court that the holder is fit to be entrusted with professional and judicial matters and to aid in the administration of justice as an attorney and counsellor and as an officer of the Court". MCR 9.103(A)

In a decision which has often been cited to this Board, the New Jersey Supreme Court announced in 1979 that New Jersey lawyers who steal from their clients will generally be disbarred. The Court noted:

> "Maintenance of public confidence in this Court and in the bar as a whole requires the strictest discipline in misappropriation cases. That confidence is so important that mitigating factors will rarely override the requirement of disbarment. If public confidence is destroyed, the bench and bar will become crippled institutions. Matter of Wendell B. Wilson, 81 NJ 451; 409 A2d 1153 (1979)

I believe that a lawyer's duty to tell the truth is as important as the duty to safeguard client funds and I believe that the rationale in Wilson, supra is applicable in cases involving forged court orders.