STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,
State of Michigan
Attorney Grievance Commission,

Petitioner/Cross-Appellant,

v

Wilfred C. Rice, P 19411,

Respondent/Appellant.

Case No. 90-85-GA

Decided: October 11, 1991

BOARD OPINION

The respondent and the Grievance Administrator have each petitioned the Attorney Discipline Board for review of a hearing panel order suspending the respondent's license to practice law in Michigan for 121 days for his misuse of client funds in violation of Canon 9, DR 9-102(A). Four additional counts were dismissed by the panel. It is the respondent's position that the hearing panel's findings of misconduct were without evidentiary support and that the complaint should be dismissed. The Grievance Administrator urges that the panel's dismissal of counts two through five should be reversed and that the level of discipline should be increased.

The hearing panel's findings and conclusions with regard to the charges of professional misconduct have been reviewed for proper evidentiary support on the whole record. It is the Board's conclusion that those findings should be affirmed. On the issue of the appropriate level of discipline, it is the Board's conclusion that the discipline imposed by the hearing panel should be modified by increasing to a suspension of 180 days.

Count I of the petitioner's formal complaint alleged that the respondent was retained by Nancy Blair in July 1987 to represent her in a real estate transaction. It was charged that the respondent was entrusted by Nancy Blair with the sum of $40,000 to be held in escrow but that the respondent failed to deposit those funds into an identifiable trust account as then required by Canon 9 of the Code of Professional Responsibility, DR 9-102(A). Further, the complaint charged, the respondent failed to return the money to his client as requested and misappropriated those funds.

Throughout these proceedings, the respondent has acknowledged that he was entrusted with $40,000 in cash to be held by him pending the consummation of that real estate transaction. He has denied, however, that his client was Nancy Blair, maintaining that his true client was her son, George Blair. It is the respondent's position that the name “Nancy Blair”, was used in negotiations with the Liquor Control Commission and that her name was used as a “ shield” for his client George Blair (memorandum in support of motion for dismissal, page I). In respondent's words, his client “was fronting his mother to be the purchaser”. (Tr. p. 15) As this case has progressed, respondent has continued to provide details regarding the source of the funds in question. In his brief f iled May 14, 1991, the respondent asserts that the $40,000 in question was delivered to him in a brown paper bag containing two $20,000 packages of $20-00 bills. According to the respondent, this money was sent to his office by George Blair's employer, “a known large-scale drug dealer”. (Respondent's Brief in Support of Petition for Review, page 3)

In its review of the panel's finding that an attorney/client relationship did exist between the respondent and Nancy Blair, the Board must determine whether that finding has proper evidentiary support on the whole record. In re Freedman, 406 Mich 256; 277 NW2d 635 (1979); In re Grimes, 414 Mich 483; 326 NW2d 380 (1982). We agree completely with the hearing panel that there are obvious difficulties with the respondent's defense that he aided in a deliberate and material misrepresentation of his true client to the Liquor Control Commission.

The evidence considered by the panel included a receipt for $40,000 issued to Nancy Blair (not George Blair) signed by the respondent, a check in the amount of $40,000 issued to Nancy Blair on December 1, 1987, and a mortgage and a quit-claim deed to certain real property from the respondent to Nancy Blair delivered to her in lieu of the $40,000 which she had demanded. By any standard, the evidence in support of the panel's finding on this issue was more than ample.

> Similarly, the record clearly supports the finding that the respondent's handling of those funds was in direct violation of the requirements of Canon 9 of the Code of Professional Responsibility, DR 9-102(A). That rule directs that all funds of a client paid to a lawyer, other than advances for costs and expenses, “shall be deposited in one or more identifiable bank accounts maintained in the state in which the law office is situated. - .”. Contrary to that rule the respondent gave the funds to a third person to be placed in a safe in the respondent's home. At the hearing, the respondent refused to identify that person and refused to provide the names of other persons residing with him. (Tr. p. 23) He explained that he did not place the money in the safe himself because he did not remember the combination at the time. (Tr. p. 23) When the real estate transaction was not completed and Nancy Blair and/or George Blair requested return of the $40,000, the respondent discovered that the clients' funds were no longer in the safe. (Tr. p. 27) and that “all of a sudden the money disappeared”. (Tr. p. 28)

According to the respondent, this method of handling client funds was not unusual in the course of his practice.

> "You have to understand the kind of people I represent tell you right a way they don't want their money put in the bank . . . that they always let you know, that they do not want their money put in the bank. So I have held millions of dollars for clients the same way . . . I can only think of approximately two or three times in the thirty years I have been practicing law wherein the clients that I represent that I put any money in the bank and they were on important jury cases." (Tr. p. 18,19)

The respondent's handling of client funds in this case clearly violated both the letter and the spirit of DR 9-102(A). That disciplinary rule contains no language allowing an attorney to violate the requirements of the rule if instructed to do so by a client. Although it is a lawyer's duty to vigorously pursue the client's interests, "that duty must be met in conjunction with, rather than in opposition to, other professional obligations". Thornton v U.S., 357 A2d 429, 437 (D.C. 1976).

> "An attorney owes his first duty to the court. He assumed his obligations toward it before he ever had a client. His oath requires him to be absolutely honest even though his client's interest may seem to require a contrary course. The [lawyer] cannot serve two masters and the one [he has] undertaken to serve primarily is the court". In re Integration of Nebraska State Bar Association, 133 Neb. 283, 2 9; 275 NW 265, 268 (1937); (Accord Johnson v U.S., 360 F2d 844 (CADC 1966) Burger, J., concurring)

In this case, the respondent was obligated at all times to comply with the disciplinary rules promulgated by the Supreme Court. At the point that his compliance with those rules conflicted with the wishes of his client, he was obligated to withdraw from representation.

The Board has been presented with relatively few cases in the past in which an attorney charged with misappropriation of client funds has acknowledged that the funds were not deposited in a trust account but were maintained in a safe at respondent's office or home. See, for example, Matter of Lee 0. Williams, ADB 130-87, Brd. Opn. 12/29/88 and Matter of Kenneth M. Scott, DP 178/85, Brd. Opn. 2/8/88. Other jurisdictions, however, have commented on such a defense. In Louisiana State Bar Association v Whittington, 459 Sad 520 (LA. 1984), the Supreme Court of Louisiana rejected the respondent's unsubstantiated claim that he held funds belonging to a client in a black box at his home and found that his inability to produce the cash when it was demanded by the client supported the conclusion that the respondent had converted those funds to his own

use in violation of DR 9-102. Following that decision, the Louisiana Court made clear its opinion of such a defense.

> "Indeed when an attorney relies upon a 'black box' defense, viz., that he kept client funds secretly but securely in a private safe or similar unregulated depository, the likelihood of actual embezzlement is so great, and the policy of professional responsibility in protecting the client from such risks so strong that it should be presumed that the attorney is guilty of embezzlement unless he successfully carries both the burden of going forward with the evidence and the burden of persuasion otherwise." Louisiana State Bar Ass'n v Krasnoff, 488 S2d 1002, (LA. 1986)

The Louisiana Supreme Court expressed its concern with the potential risk to client funds not deposited in a bank account as required by Canon 9. The case now before the Board demonstrates all too clearly the actual risk. Regardless of the source of the $40,000 handed to the respondent he has admitted that they were funds entrusted to him by a client. He has admitted his failure to place the funds in an identifiable bank account. He has admitted handing the money over to a third person with instructions to place the money in a safe to which the respondent would not have immediate access because he did not know the combination. The respondent has admitted that the money entrusted to him "disappeared". Given the most charitable characterization, respondent's handling of those funds could only be described as grossly negligent.

Count II of the complaint, which alleged that the respondent prepared, executed and delivered a $40,000 check payable to Nancy Blair when he knew or should have known that there were insufficient funds in that account, was dismissed by the hearing panel. The panel acknowledged that the evidence established that the check tendered to Ms. Blair was ultimately returned for insufficient funds but the panel concluded that, in light of the respondent's testimony, the evidence did not preponderate toward a showing that MCR 9.104(1-4) and/or Canon 1, DR 1-102(A)(1, 3-6) had been violated. There is support in the record below for this evidentiary conclusion and the dismissal of that Count is affirmed.

For the same reason, we affirm the panel's dismissal of Count V. That Count charged that the respondent made false statements to the Attorney Grievance Commission in response to the Request for Investigation. Based upon review of the record, we adopt the panel's conclusion that the evidence did not establish that the respondent's claim that the escrow funds were placed in his personal safe was a false statement or that he made a false and material misrepresentation to the Grievance Commission regarding what he believed to be the source of the escrow funds.

Counts III and IV of the complaint were based upon the respondent's execution of a mortgage and a quit-claim deed to Nancy Blair for real property located in the City of Detroit. Those Counts charged that in

executing those documents he falsely represented himself to be the authorized agent of a church having an interest in that property and falsely represented that he had authority under a power of attorney on behalf of his wife. There is no question that the respondent's representations regarding the extent of his authority was subsequently contradicted by the respondent himself in his own answers and affirmative defenses filed in a later civil proceeding, in his letters to Nancy Blair's attorney and in his answer to this formal complaint.

Like the panel, the Board is troubled by the diametrically opposed representations made by the respondent with regard to his authority or lack of authority to execute those instruments. However, the Board has been presented with no authority in support of the Grievance Administrator's position that presentation of the respondent's conflicting statements shifted the burden of proof to him to rebut his previous allegations. Had the charges against the respondent been pleaded in the alternative, the evidence could have supported a finding by the panel that since the respondent's contradictory statements could not both be true, a misrepresentation as to one position or the other was established. Having elected to charge the respondent only with falsely representing that he did have authority to act for his wife and the church, the burden of proof remained with the petitioner to establish that those representations were false.

Finally, the Board has considered the level of discipline imposed by the panel. The Board has taken notice of an apparent ambiguity in the hearing panel chairperson's announcement on the record that the respondent would be suspended for a period of 120 days and the suggestion by the chairperson that the respondent would be entitled to automatic reinstatement. The panel's written Order of Suspension and accompanying final report filed February 12, 1991, however, were both signed by the panel's chairperson and reflect the panel's decision to impose a suspension of 121 days.

The Board has also noted in prior opinions an apparent anomaly between the provisions of MCR 9.123 which require reinstatement for suspensions longer than 119 days and the references in MCR 9-106(2) to suspensions exceeding 179 days. It remains the Board's view that, unless modified by the Supreme Court, Rule 9.123(B) is controlling and reinstatement proceedings are mandatory in all cases involving suspensions with a term greater than 119 days.

The Board wishes to dispel any confusion on that issue in this case. The respondent's misconduct charged in Count I and established by the evidence, constitutes violations of MCR 9.104 and Canons I and 9 of Michigan Code of Professional Responsibility, DR 1-102(A)(1, 3-6); DR 9-102(A), and DR 9-102(B)(4), and requires that respondent be suspended from the practice of law for a period of 180 days and until he has established his eligibility for reinstatement to the satisfaction of a hearing panel, the Board or the Supreme Court in accordance with MCR 9.123(B) and MCR 9.124.

Concurring: John F. Burns, Remona A. Green, Hanley M. Gurwin, Linda S. Hotchkiss, M.D., and Theordore P. Zegouras

DISSENTING OPINION

George E. Bushnell, Jr.,
Elaine Fieldman

We agree with the majority's conclusion regarding the evidentiary support for the panel's decision to sustain the charges in Count I of the complaint and to dismiss the charges in Counts II through V. However, we do not believe that it is necessary to modify the discipline imposed by the panel. The panel's decision to impose a suspension of 121 days was based upon its first-hand observation of the respondent and its consideration of the aggravating and mitigating factors in the context of the evidence presented by both parties. We would affirm the hearing panel's decision.