STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,
State of Michigan
Attorney Grievance Commission,

Petitioner/Appellee,

v

William John Gerard,

Respondent/Appellant.

Case No. 90-120-RD

Decided: April 30, 1991

BOARD OPINION

This is a reciprocal discipline case in which the respondent, licensed to practice law in both Michigan and Illinois, was suspended for one year by the Illinois Supreme Court. The Grievance Administrator then instituted reciprocal discipline proceedings in Michigan in accordance with MCR 9.104. The hearing panel below entered an order suspending respondent's license to practice law in Michigan for 142 days, a suspension which was deemed to be concurrent and coterminous with his suspension in Illinois for a one-year period ending January 18, 1991.

The Attorney Discipline Board has considered the respondent's petition for review seeking modification of the hearing panel's order on the grounds that the panel's decision was based on an erroneous representation by the Grievance Administrator that the acts of misconduct in the State of Illinois included commingling of client funds and were characterized by the Illinois Supreme Court as fraud. He argues further that a one-year suspension in Illinois does not require a petition for reinstatement and the 142-day suspension in Michigan is therefore not "identical" within the meaning of MCR 9.104.

The Board concludes that the adjudication of professional misconduct by the Supreme Court of Illinois was not based upon charges of fraud and commingling. The findings of the hearing panel should therefore be corrected to exclude those references. It is the Board's further conclusion that the hearing panel decision to impose a suspension of 142 days should be affirmed.

Reciprocal discipline proceedings are governed by that portion of MCR 9.104 which provides:

> "Proof of an adjudication of misconduct in a disciplinary proceeding by another state or a

> United States court is conclusive proof of misconduct in a disciplinary proceeding in Michigan. The only issues to be addressed in the Michigan proceeding are whether the respondent was afforded due process of law in the course of the original proceedings and whether imposition of identical discipline in Michigan would be clearly inappropriate."

On July 11, 1990, the Grievance Administrator filed a Petition for order to Show Cause accompanied by a certified copy of the opinion issued by the Supreme Court of Illinois on December 21, 1989 in that Court's docket no. 68434 - In re William J. Gerard. That opinion is, of course, the best evidence of the adjudication of misconduct in Illinois. It is sufficient here to note that the respondent agreed to draft a will for Ruth Randolph, then eighty-four years old. She also wanted him to help her ..recover" certain paper assets she owned that were missing. He discussed with her a choice between a flat hourly rate or a one-third contingent fee arrangement. She elected the contingent fee agreement. Wring the next month, he contacted the institutions she had identified and discovered certificates in the approximate amount of $450,000, all on deposit under Randolph's name. He re-registered the securities in the name of the trust he had established.

Although he subsequently claimed 160 hours "recovering" the certificates, he acknowledged that his activities required no exceptional legal skills and could have been done by the client herself if she had been able bodied. For these services, he retained for himself a total fee of $159,648-60, an amount which exceeded one-third of the value of the recovered certificates. Following Randolph's death he renegotiated with the estate's executrix and accepted a fee of $28,000 representing 160 hours at $175-00 per hour.

Disciplinary proceedings were commenced in Illinois and a hearing board recommended a six-month suspension. This discipline was increased to a one-year suspension by a review board which characterized the respondent's conduct as extreme overreaching and fraud. In its written opinion, the Illinois Supreme Court limited the findings of misconduct to the collection of an excessive fee and ordered a suspension of one year.

At the commencement of the proceedings before the hearing panel in August 1990, a certified copy of the Illinois Supreme Court opinion was received into evidence. Respondent Gerard was not present. His appeal is based in part upon a statement made to the panel by the Grievance Administrator's counsel:

> "The respondent here in this case has been convicted on charging an excessive fee, of fraud which was perpetrated upon his client, a breach of a fiduciary relationship to his client and at least commingling of the funds that he took at the time that he processed the money from the accounts of his client at that time.

Neither the comments of the hearing panel members on the record nor the panel's report specifically refer to a finding of fraud. However, the panel's report does note the reference to commingling. On appeal, the Grievance Administrator insists that the references to "fraud" and " commingling" are appropriate because the facts cited in the opinion from the Supreme Court of Illinois would support charges of commingling and fraud.

We agree with the respondent that the Illinois decision is conclusive on the issue of misconduct for purposes of these reciprocal disciplinary proceedings and that the findings of misconduct of the Illinois Supreme Court control in this forum. Whether commingling could have been charged by the Illinois Attorney Registration and Disciplinary Commission (ARDC) is not the issue. Commingling of client funds was not charged in Illinois and was not found.

With regard to the fraud issue, it is true that the Illinois opinion includes an extensive discussion on that subject and that Court stated that the facts in the case could have supported a finding of fraud under several theories. The Court pointed out, however, that fraud was not, in fact, established under the theory advanced by the ARDC and the Court's finding of misconduct was therefore limited to the respondent's collection of an excessive fee aggravated by two related courses of conduct which were ethically improper: 1) Respondent's direct deposit into his own account of ten of the twenty-three certificates of deposit may have constituted "improperly collecting portions of his fee" before he knew his client's rights were secure; and, 2) Respondent had his client sign a release without advising her to seek independent legal advice.

The Grievance Administrator has not filed a petition for review. Therefore, the only issue before the Board with regard to the level of discipline is whether the hearing panel suspension of 142 days should be affirmed or reduced, as requested by the respondent.

The hearing panel in this case ordered that the respondent's license to practice law in Michigan be suspended for 142 days commencing August 30, 1990. At first glance, this suspension appears to be exactly what the respondent requested in his pleadings--a concurrent suspension "coterminous" with a one-year suspension in Illinois ending January 18, 1991. He now argues, however, that the two disciplines are not clearly "identical" for purposes of MCR 9.104 because the applicable court rules in Illinois allow automatic reinstatement in the case of a one-year suspension while the Michigan Court Rules [MCR 9.124] require a lengthy reinstatement process which includes investigation by the Attorney Grievance Commission and separate hearing before a new panel.

This issue was addressed by the Board in Matter of Mark L. Davis, ADB 47-89, Brd. Opn. March 22, 1990. In that case, reciprocal discipline proceedings were instituted in Michigan as the result of the respondent's one-year suspension in Colorado as the result of a misdemeanor conviction involving possession of marijuana. As in Illinois, the rules in Colorado allow automatic reinstatement when an attorney has been suspended for one

year. In Davis, the hearing panel reasoned that the reinstatement requirements were more significant than the length of the suspension in determining "identical discipline" under Michigan's reciprocal discipline rule. Respondent was therefore suspended for 119 days in Michigan to allow for automatic reinstatement.

In affirming that decision in Davis, the Board stated:

> "We are persuaded by respondent's argument that if we are to give full faith and credit to the disciplinary sanction imposed by the Supreme Court of Colorado, we should be equally willing to give full faith and credit to that court's decision that respondent's suspension should be terminated without the additional time and expense of a lengthy reinstatement process.

We believe, however, that this case is distinguishable. In Matter of Mark Davis, the Board noted that there was "considerable merit" to the Administrator's argument that the nature of the respondent's misconduct (conviction of drug-related offense) could support a more severe form of discipline but that the Board's decision was based on its recognition of the "extraordinary mitigating circumstances" identified by the Supreme Court of Colorado. Such mitigation is entirely absent in this case. On the contrary, the Supreme Court of Illinois rejected virtually every one of the mitigating circumstances put forward by the respondent.

It should also be noted that in Davis, this Board deferred to the judgment of the hearing panel that a 119-day suspension followed by automatic reinstatement was appropriate under all of the facts and circumstances of that case. In this case, similar deference to the hearing panel's judgment leads to the conclusion that the suspension of 142 days should be affirmed. Given the egregious nature of the respondent's misconduct and the extensive discussion of the aggravating and mitigating factors considered by the Supreme Court of Illinois, we believe that there is ample evidentiary support in the record to support the panel's decision.

Finally, we must address the issue of the automatic stay of discipline which was affirmatively requested by the respondent at the time he filed this petition for review. The hearing before the panel was conducted on August 30, 1990. At the conclusion of that hearing, the panel issued its Interim Order of Suspension suspending the respondent's license to practice law in Michigan for 142 days commencing August 30, 1990 and until further order of the Supreme Court, the Board or a hearing panel in accordance with MCR 9.123(B) and MCR 9.124. The Order was served upon the respondent and on September 13, 1990 he filed an Affidavit of Compliance pursuant to MCR 9.119.

The hearing panel's final Order of Suspension was not filed until November 1, 1990. The respondent's Petition for Review, filed November 20, 1990 included a specific request that there be a stay of discipline. Respondent noted that the suspension ordered by the panel was less than 179

179 days and that a stay of discipline was therefore automatic under the provisions of MCR 9.119(K).

The Grievance Administrator filed a response in opposition to the request for a stay on the grounds that the automatic stay provisions of that rule apply only in cases instituted by the filing of a formal complaint. We believe that the automatic stay of discipline provision of MCR 9.115(K) was applicable in this case. That Court Rule directs that a stay will automatically issue on the timely filing of a petition for review if a "discipline order" is a suspension is 179 days or less. There is no language in that rule which suggests that discipline orders resulting from formal complaints are to be treated differently from discipline orders resulting from criminal convictions [MCR 9.120] or orders of discipline resulting from reciprocal proceedings. [MCR 9.1041).

We affirm the hearing panel's suspension of 142 days and conclude that respondent's suspension in Michigan became effective August 30, 1990 upon the filing of the panel's interim order. The suspension remained in effect until the filing of the respondent's petition for review of November 20, 1990. The respondent is therefore credited with the eighty-two days which have been served. The automatic stay of discipline shall remain effective twenty-one days after the entry of this order and opinion. The respondent shall be eligible to file a petition for reinstatement in accordance with MCR 9.123(B) upon the expiration of the final sixty days of the suspension ordered by the hearing panel.

All concur.