GRIEVANCE ADMINISTRATOR,
Petitioner/Appellee,

ROBERT D. BRANT,
Complainant/Appellant,

v

THOMAS J. McCALLUM, P-17274
Respondent/Appellee.

Case Nos. 90-18-GA; 90-42-FA

Decided: October 9, 1990

BOARD OPINION

The respondent in this case failed to answer or appear before the panel in response to a four-count complaint alleging acts of professional misconduct in his handling of a legal matter for Mr. and Mrs. Robert D. Brant. The panel found that the allegations were deemed to be admitted by virtue of the respondent's default and an order was entered suspending his license to practice law for a period of one year, to run concurrently with a three-year suspension in an unrelated matter. The panel declined to require that the respondent make restitution to Mr. and Mrs. Brant by returning the $500 retainer fee which they had paid. The Board has considered a petition for review filed by the complainants and has concluded that the order of discipline should be modified and that respondent should be required to make restitution to his former clients in the amount of $500, with interest.

The respondent, Thomas J. McCallum, has not participated during any stage of these proceedings, including the review hearings conducted before the Board on July 20, 1990 in accordance with MCR 9.118. No challenge has been offered to the panel's conclusion that the allegations of misconduct set forth in the Grievance Administrator's four-count complaint have been established.

The respondent was retained in March 1989 by the complainants to file a suit for damages resulting from a faulty roof and basement in a home which they had purchased. Count I of the complaint charges that the respondent failed to notify his clients of his law office relocation or to provide them with a forwarding address or telephone number. He was further charged with failing to file the cause of action on his clients' behalf until September 8, 1989.

Count II contains specific allegations of six separate occasions from May 6, 1989 to September 8, 1989 in which the respondent falsely represented to his clients that a complaint had been filed.

Count III recited the respondent's acceptance of a retainer fee from Mr. Brant in the

amount of $500 and charged a violation of his duty to refund the unused portion of that retainer after his discharge as the Brant's attorney.

Count IV was based upon the respondent's failure to answer the Request for Investigation filed with the Attorney Grievance Commission by Mr. Brant.

At the hearing conducted before the panel in March 1990, the complainants, Mr. and Mrs. Brant, were called as witnesses and were given an opportunity to address the panel regarding their experience with Mr. McCallum. In response to the request that they consider an order of restitution as part of the discipline to be imposed, the panel wrote in its report:

> With regard to the request for restitution, the panel has carefully considered that claim and has determined that, in light of the testimony that a complaint was, in fact, filed albeit later than the representations made to the client, restitution would not be appropriate in this case. Legal and factual issues involved in determining the nature and value of the respondent's services in this case would more appropriately be resolved in a civil proceeding.

The authority of a hearing panel, the Board or the Supreme Court to order restitution as a condition of an order of discipline is explicitly set forth in MCR 9.106(5). In a majority of cases in which restitution is ordered, a disciplined attorney is ordered to return funds wrongfully taken or withheld from a client. In such cases, the amount to which the client is entitled normally can be determined with some degree of certainty. We agree with the panel's observation in this case that the legal and factual issues presented in a legitimate fee dispute normally should be the subject of a civil proceeding or an arbitration conducted in accordance with MCR 9.130.

Based on the record below and the arguments presented by the complainants, however, the Board has elected to amend the hearing panel's order of discipline, as it is empowered to do by MCR 9.118(D).

In a 1978 opinion, our predecessor disciplinary agency, the State Bar Grievance Board, noted:

> The purpose of the grievance machinery, as long recognized by the Bar, is not to punish the lawyer, but to protect the public and to demonstrate to the general public that those within our profession should be made to atone for their mistakes by making the aggrieved complainant whole; which might be considered as the first and foremost Canon of Ethics.

<u>In re Dunn</u>, State Bar Grievance Board, 35169-A (Brd. Opn. p. 56, 1978).

The respondent's conduct in this case, including his neglect, failure to communicate,

failure to return documents and deliberate misrepresentation, combined to hinder rather than advance his clients' claim. Mr. McCallum did file a complaint on behalf of Mr. and Mrs. Brant but, as they have emphasized, it was filed only after their grievance proceedings were instituted and the respondent took no action to have a complaint and summons served on the defendant.

Although ordered to appear before the Board for the show-cause hearing in accordance with MCR 9.118(C), the respondent has consistently failed to appear and has interposed no objection to the complainants' request for restitution. The Board is advised that the Attorney Grievance Commission takes no position. Restitution in this case is not only consistent with the general rule that an attorney may lose the right to fees for unprofessional conduct or abandonment of a client's case, Rippey V Wilson, 280 Mich 233 (1937) but is, in this case, consistent with our duty on behalf of the Supreme Court and the legal profession to protect the public.

John F. Burns, Hon. Martin M. Doctoroff, Remona A. Green, Hanley M. Gurwin, Linda S. Hotchkiss, M.D. and Theodore P. Zegouras

DISSENTING OPINION

Robert S. Harrison

I believe that the hearing panel in this case acted well within their discretion by denying the request for restitution and I further believe that the Board risks setting a dangerous precedent by ordering the return of legal fees where identifiable legal services have been performed. By the complainants' own testimony, the respondent performed approximately five to six hours of legal services at an agreed upon rate of $125 per hour. The facts in this case simply do not support an award of restitution without an appropriate factual determination by an appropriate tribunal.

In this case, the respondent was served with a complaint by the Grievance Administrator which charged that his acts professional misconduct warranted the imposition of discipline. I do not believe that he was properly placed on notice that a claim for attorney fees was to be considered during the discipline proceedings. I strongly disagree that the discipline process is appropriate forum in which to render judgments as to the value of an attorney's services.