

GRIEVANCE ADMINISTRATOR,
Petitioner/Appellee,
v
GARY B. PERKINS, P-18787
Respondent/Appellant.

File No. DP 123/85

Argued: November 11, 1986

Decided: February 2, 1987

OPINION OF THE BOARD

The Respondent was retained in 1982 to represent the interests of a client arising from the wrongful death of the client's former husband. It was agreed by the Respondent and his client that he would receive a one-third contingent fee for any recovery he was able to obtain in the wrongful death case but that contingent fee agreement was not reduced to writing, contrary to GCR 1963, 9.28 [now MCR 8.121]. The Respondent prepared and filed a Petition to Commence Probate Proceedings in November 1982 and negotiated a settlement of the wrongful death claim which was paid by the insurance carrier in September 1983.

The Hearing Panel found that the Respondent's failure to reduce the contingent fee agreement to writing as required by the court rule was clearly improper and further found that Respondent's subsequent handling of the estate in the Probate Court constituted violations of his duties under Canons 6 & 7 of the Code of Professional Responsibility to represent his client competently and expeditiously. Specifically, the Panel cited Respondent's failure to obtain approval of the Probate Court before distributing the proceeds of the wrongful death settlement, the Court's disallowance of the account which he prepared and filed, and his failure to take adequate steps to bring the probate proceedings to a close, despite the repeated requests of his client and the Attorney Grievance Commission. The Panel concluded that Respondent's mishandling of the probate matters warranted a suspension of thirty (30) days.

In review proceedings instituted by the Respondent, he argues that professional misconduct was not established by the evidence presented at the hearing and, in the alternative, that the discipline imposed is excessive.

The Board concludes that the Hearing Panel findings of fact had ample evidentiary support in the record and we decline to disturb those findings. We agree, however, that a suspension appears to be unduly harsh in this case in light of the nature of the misconduct charged, the lack of harm to the client and Respondent's prior unblemished record. We therefore modify the Hearing Panel Order of Discipline and reduce to a Reprimand.

Certain aspects of Respondent's handling of the probate matter following the settlement of the wrongful death action in September 1983 are beyond dispute and are, in fact, acknowledged by the Respondent. The procedure governing the distribution of wrongful death proceeds is governed

by statute and the Respondent made distribution, including his own attorney fees and net proceeds to his client, without seeking the approval of the Probate Court.

Although the Respondent eventually prepared and filed an account of fiduciary on behalf of his client, that account was disallowed by the Court in November 1984 because the Respondent had failed to file the proper petition for the distribution of the wrongful death proceeds. On the date of the hearing on this Formal Complaint, March 5, 1986, the probate proceedings had still not been closed. The Panel was Justified in concluding that Respondent's handling of the estate fell short of those standards of zeal and competence embodied in Canons 6 & 7 of the Code of Professional Responsibility.

We specifically affirm the Hearing Panel's conclusion that the Respondent's failure to reduce a contingent fee agreement to writing constituted a violation of former GCR 928.6 [now MCR 8.121(F)] and that the violation of that Court Rule may be considered an act of professional misconduct warranting discipline. While we agree with Respondent's argument that the terms of the verbal contingency fee agreement were never disputed by the client and that the absence of actual harm to the client constitutes a mitigating factor, the Court Rule in question is an explicit mandate by the Court regarding an attorney's duty to his or her client. Failure to comply with such a rule must, at the very least, be considered to be conduct that is prejudicial to the administration of Justice and conduct that adversely reflects on that attorney's fitness to practice law.

Based upon the record before us, we are persuaded that a suspension of thirty (30) days would be unduly punitive. Respondent has enjoyed an unblemished record during 16 years of legal practice in this state and, while we cannot condone his handling of this probate matter, the record contains no evidence that this is part of a wider pattern. Discipline is therefore reduced to a reprimand.

All concur (Board Member Odessa Komer did not participate).