IN THE MATTER OF DAVID N. WALSH,
A Member of the State Bar of Michigan,
Respondent
No. 36462-A

Decided: September 26, 1980

OPINION OF THE BOARD

Respondent was consulted by a number of homeowners in July, 1976, regarding the failure of the builder of their subdivision to construct a community swimming pool and club as the builder had advertised. The homeowners formed an unincorporated association to be named plaintiff in a suit against the builder. From the contributions of each member of the organization, a total of $3,000 was collected for legal fees and was given to Respondent under a retainer agreement for complete legal fees to be charged for his services, through the first level of appeal.

Plaintiffs' original plan was to ask for an injunction to prevent the builder from disposing of the only remaining suitable lots upon which a swimming pool could be built. The court, however, found that damages would suffice and did not issue the injunction. Respondent then brought the suit as a class action. Defendant moved for accelerated and summary judgment. The judge, although denying these motions, encouraged Respondent to amend his complaint so that each paragraph alleged harm to each member of the association. The court did not reduce this suggestion to an order. The court made no finding that the complaint would not be certified as a class action.

Respondent did not amend the complaint in this manner, claiming that he feared the organization had in the interim become so large that it would be unwieldy to add a paragraph for each member; he asserts that he was also involved in other litigation and feared defendant's counsel would overwhelm him with discovery requests after the amended complaint had been filed.

The association of clients, through its president, frequently inquired about the status of the case. A meeting was arranged at a school so that Respondent could explain the progress of the case to the clients, Members later testified, and Respondent admitted, that he was intoxicated when he attended the meeting. Soon afterward, the organization voted to dismiss Respondent as its attorney. The president notified Respondent, who offered to return $2,000 of the $3,000 retainer he had collected; the president agreed.

After receiving individual complaints, the Grievance Administrator charged Respondent with misrepresenting to the clients that the suit was pending and would come to trial; failure to file a default against the builder-defendant; failure to institute a proper class action; failure to follow the judge's suggestion and institute separate civil actions for each client; failure to respond to inquiries from the group about the case; and, by reason of his neglect, charging an excessive fee. The Hearing Panel found sufficient evidence to support the allegations, and suspended Respondent for 121 days. The Grievance Administrator, Respondent, and Complainants all petitioned for review on various grounds. Because certain allegations were not proven by a preponderance of the evidence, yet were relied on by the Panel as a basis for discipline, we reduce discipline to a suspension of 120 days.

Both the Grievance Administrator and Respondent agree that the allegations of failure to file a default against the defendant--builder was unsupported and should be stricken.

The Panel finding of the charging of an excessive fee [DR 2-106 (a)] is incorrect in the Board's view. It is not suggested that the $3,000 initially agreed to and collected was excessive for the work Respondent contracted to perform. Indeed, conceivably, the fee may not be deemed excessive for the forty (40) hours of work actually performed (undisputed on the record), albeit only in partial performance of the contract. Respondent was found by the Panel to have violated DR 7-101(a)(2) regarding failure to carry out a contract of employment, and we affirm this finding. However, the allegation of charging an excessive fee is discrete, and should not be confused with the contractual obligation. A fee not earned should be distinguished from a fee that is excessive. "As we view the matter, the point is not whether the . . . fee agreed on by the parties was excessive for services to be rendered, but is whether under the terms of the agreement it can be said, in good conscience, that the amount of the fee ... was ever actually earned in full." Florida Bar v Moore, 194 So2d 264, 270 (Fla. 1966). Perhaps the money retained by Respondent cannot be said to have been fully earned, but that is not, as we see it, misconduct under the excessive fee rule.

The record does not contain sufficient evidence to conclude that the suit filed by Respondent failed to classify as a class action. Respondent's `failure to begin separate civil actions on behalf of the litigants, while perhaps an error of Judgment, did not violate an order of the court. However, we are satisfied that Respondent misled his clients to believe that he was diligently pursuing their lawsuit. While Respondent did not do all that he could to protect his clients' interests, which supports a finding of a violation of Canon 7 and the imposition of discipline, the clients did not lose their cause of action. Further, even the failure to institute separate civil actions did not Jeopardize his clients. Respondent acknowledged certain judgmental errors and expressed an intent to repay two-thirds of the fee.

Substantial findings of the Panel having been reversed, the Order of Discipline is amended, and Respondent is suspended for one hundred twenty (120) days.

It should be noted that the Board's Order Reducing Discipline was issued prior to the filing of this Opinion; this action was taken to avoid the punitive effect of continuing the suspension beyond that period deemed appropriate herein.