Grievance Administrator
v
SANFORD N. LAKIN,
Respondent

File Nos. DP-19/83; 113/82

Decided: June 13, 1984

OPINION OF THE BOARD

The hearing panel found that Respondent charged and collected an excessive contingent fee in a personal injury matter in violation of GCR 1963, 928.2. Pursuant to an oral modification of a previous fee arrangement with the Client-complainants, Respondent charged and later received 30% of the judgment in the Complainants' case, resulting in an excess charge of $135,000. The hearing panel imposed a suspension of ninety days. We reduce discipline to a reprimand.

In November 1975 Respondent agreed to represent Complainants in a personal injury action. Complainants signed a contingent fee agreement calling for fees to be calculated in accordance with GCR 1963, 928, which had gone into effect in May 1975. That court rule stated, in part:

> " . . . the attorney and client may agree to a contingent fee of one-third of the entire recovery that does not exceed $250,000, and 20% of the next $250,000, and not to exceed 10% of any amount recovered over $500,000." GCR 1963, 928.2(2) [before 1981 amendment.]

This rule was in effect throughout the relevant time-period in this case.

Respondent alleged that during the course of his representation and after execution of the written fee agreement, the Complainants insisted that Respondent personally handle their case, and that he not delegate it to other attorneys in his office. Respondent agreed to this, but apparently did so only in consideration of Complainant's oral agreement to amend the fee agreement to a flat 30% of all sums recovered, regardless of the total award.

In October, 1979 the Complainants, husband and wife, were awarded a judgment of $1,233,289 in the case handled by Respondent. Of this amount, $1,109,960 was awarded to the wife, and $123,329 to the husband. The Respondent collected 30% of the husband's recovery; this portion of the fee is not in dispute, having fallen within the limits of former Rule 928. Respondent and Complainants later submitted their fee dispute to mediation, and reached a settlement in which Respondent returned all but $10,700 of the excess portion of the fee.

Respondent claims that his violation of the rule was "technical" only, and that a ninety day suspension is too harsh under the circumstances. He has an unblemished record, and a good reputation in the legal community; and he asserts that he believed in good faith that the fee was reasonable given the work involved, the insistence on his personal involvement, and the amount

recovered. The Grievance Administrator claims that the discipline assessed is appropriate.

Then, as now, GCR 1963, 928 specifies that "receipt, retention, or sharing of compensation which . . . [exceeds permissible limits] . . . shall be deemed to be the charging of a clearly excessive fee' in violation of Canon 2, DR 2-106(A) of the Code of Professional Responsibility."

This Board has dealt with a similar fee dispute governed by GCR 1963, 928. In Dean v Ward, File No. 34204-A (1980), discipline vacated without opinion, 413 Mich 1106 (1982), respondent represented complainant's minor son in an action against the Detroit Police Department. The lawyer and client agreed that the fee would be 50% of any recovery. The case was settled for $325,000, but complainant filed a grievance charging that the 50% fee was unfair and violated Rule 928. The complaint was dismissed by the hearing panel, and by the former State Bar Grievance Board. The Michigan Supreme Court remanded, and another hearing panel found "technical misconduct," but declined to impose discipline. On review, this Board imposed a reprimand, holding that even technical misconduct must draw discipline under GCR 1963, 964.10(2). The Michigan Supreme Court first denied leave to appeal, but upon reconsideration vacated the order of discipline, stating in its order without opinion: "[W]e vacate the order of the Attorney Discipline board which imposed disciplinary action against the respondent. Our review of the record, on reconsideration, has persuaded us that under the circumstances of this case, neither a finding of misconduct nor the imposition of discipline is appropriate." 413 Mich 1106 (1982).

We do not construe the Court's Ward order as a rejection of our ratio decidendi in that case, nor can we infer modification of GCR 1963, 964.10(2), which requires entry of an order of discipline where misconduct is established. The court simply found, upon considering the facts, that misconduct had not been established. Such is not the case here, but given all circumstances in the record we think a reprimand is appropriate.

The Ward case is in other respects, a useful basis for analysis of the case at bar. The respondent in Ward claimed that he was not aware of Rule 928 which, indeed, had just been promulgated by the court. Rule 928 exempted from its scope fee agreements reduced to writing before May 3, 1975. GCR 1963, 928.7. Although the court, upon remanding to the Board, specifically found that respondent's notations on the client's file did not fulfill the requirement of an "agreement reduced to writing" under the rule, the court probably gave some weight to respondent's reliance upon those written notations. In contrast, Respondent in the present case first made a written agreement in accordance with Rule 928, but then, at least six months after the rule had gone into effect, orally amended the agreement to provide for a fee which he knew or should have known violated the rule. He certainly knew, at the time he collected his excessive fee in 1979, that the fee violated Rule 928. Finally, Respondent has admitted that the fee was excessive. In other circumstances, similar facts might warrant a suspension as a means of deterrence and for protection of clients who are unfamiliar with the fee limitation rule. However, the mitigation present here -- Respondent's long unblemished record, his reputation for competence, the quality of the unique legal services provided to these Complainants, together with the impact of a reprimand on this individual leads us to conclude that the modification of discipline is appropriate. A suspension in this case would, without a compelling need for additional measures to protect the public, deprive clients of Respondent's continuing attention to a substantial litigation caseload.

The reduction of discipline carries with it the condition that Respondent pay to the client an additional $10,700 representing the remaining portion of the excessive fee. Although most of the extra fee was paid pursuant to mediation, this amount has been retained, and so constitutes a continuing violation of Rule 928, which also condemns "retention" of compensation which is excessive. This amount must be returned within thirty days of the filing of this opinion, or discipline may be reconsidered by the Board. To that extent, the Board retains jurisdiction of this matter.

Finally, the Board wishes to acknowledge the diligence and excellence of the Oakland County Hearing Panel #5 in the hearing and decision of this matter.

AFFIRMED IN PART AND MODIFIED IN PART.

ALL CONCUR.