

IN THE MATTER OF PHILLIP E. SMITH
A Member of the State Bar of Michigan,
No. 35166-A

Decided: January 8, 1981

OPINION OF THE BOARD

FACTS

Respondent was charged with misconduct due to his mishandling of a personal injury case, and his delay in probating an estate. The Formal Complaint contained allegations of neglect, incompetence, inadequate preparation, and the charging of an excessive fee. The Midland (42d Circuit) Hearing Panel suspended Respondent for ninety days. Respondent petitioned for review on the ground that the misconduct was not shown by a preponderance of the evidence, The Grievance Administrator petitioned for review on the ground that the ninety-day suspension was an abuse of the panel's discretion in light of the seriousness of the misconduct. We affirm the findings of the panel, but increase discipline to 120 days, and until the estate in question is closed.

Count I

Count I involved a personal injury case. Complainant retained Respondent in 1965 to press a claim for damages after she and her children were injured in an automobile accident. Some of her children were injured badly enough to require extended medical treatment. Tr. of Nov. 7 at 10. Complainant was offered a settlement of \$10,000 in 1967, and consulted Respondent to ask if the offer was reasonable. She rejected the offer on Respondent's advice. Tr. at 13.

Respondent filed an action on behalf of the personal injury Complainant in 1968, one day before the statute of limitations was to expire. Tr. at 28. The defendant answered with an affirmative defense and motion for accelerated judgment. Respondent did not answer these pleadings because he thought he had reached an agreement with defendant's attorney which would obviate the need to answer. The other attorney agreed not to pursue the motion for accelerated judgment. Tr. at 28.

Complainant agreed that Respondent would receive the usual contingent fee after judgment. Complainant's case was dismissed, however, in 1970 for lack of progress. Respondent testified that he checked the status of Complainant's case at Wayne County Circuit Court once or twice a year after the initial pleadings were filed. Respondent said he was told at the court that the case could not be heard for several years, due to a crowded docket. Respondent discovered the dismissal in 1973, but did not file a motion to reinstate.

Respondent told Complainant that he would file a claim on behalf of her children separately, and did so. Tr. at 20-21. The children's suit was dismissed in 1974, but Respondent apparently did not know this for certain until told at the discipline panel hearing. Tr. at 23-24. He said he did not proceed because of a series of discussions with the opposing attorney, which he thought would lead to a settlement.

Respondent's counsel has notified the Board that Respondent has reached a restitution agreement for \$12,000 with Complainant. Bd. Tr. at 5. The Board will require documentation of the agreement, and of the restitution made.

Count II

Count II involved Respondent's probating of an estate. He was retained by the second Complainant in 1975, soon after her father's death, to probate his estate. Respondent charged \$4,200; he received \$2,000 of that amount. Respondent testified that he had not done much probate work before, and especially had not handled many large estates like the one in question. Tr. 121. He admitted that he did not file income tax returns on the estate, nor paid the applicable federal and state taxes. Tr. at 55. As partial mitigation, he pointed out that his office had been vandalized and his files upset several months after the federal taxes were due, and that this further delayed the progress of the estate. Tr. at 80. The panel was satisfied that the other allegations in the Complaint relating to the estate were proven. Other points in mitigation found by the panel are that Respondent has practiced alone for twenty-one years, and has no prior record of misconduct.

The Board increases the discipline of Respondent from ninety days to 120 days, and until the estate is closed. Discipline would have been greater were it not for the additional mitigation of restitution. The Board will require verification of the restitution agreement. Before he may be reinstated, Respondent must also file with the Board a copy of the probate court order closing the estate.

Respondent argued on appeal that his misconduct was not shown by a preponderance of the evidence. Revision of a panel decision will be on the basis of whether, upon the whole record, there is proper evidentiary support. In re Del Rio, 407 Mich 336, 285 NW2d 277 (1979). It is the decision of the Attorney Discipline Board that the charge of misconduct has been established by a preponderance of the evidence. The findings of the Midland (42d Circuit) Hearing Panel are supported by competent, material, and substantial evidence on the whole record, and are affirmed,

Our predecessor Board determined that it is professional misconduct for an attorney to accept the benefits of a contingent contract and then not properly discharge his obligation to thoroughly investigate the case and to fulfill a commitment to prosecute it unless relieved by his client or by the Court. In re Crane and Roth, 24, 30, No. 33077-A (Mich. St. B. Grievance Bd. 1976), aff'd in part and rev'd in part, 400 Mich 484, 255 NW2d 624 (1977).

A long, unblemished record of practice may act as mitigation. In re Geralds, 402 Mich 387, 263 NW2d 241 (1978); In re Crane, 400 Mich 484, 255 NW2d 624 (1977); In re Swainson, No. 34144-A (Mich. St. B. Grievance Bd. 1978); In re Charlip, No. 26340-A (Mich. St. B. Grievance

Bd.), aff'd, 398 Mich 235, 247 NW2d 297 (1976). So may restitution, yet restitution made following the initiation of discipline proceedings will not result in the Board overlooking Respondent's misconduct completely. The Board does not accept the proposition that if a client has sustained a financial loss as a result of negligent handling of a file by an attorney, or as the result of dishonest conduct, that no harm has been sustained by the client simply because of a delayed effort on the part of the attorney to try to make the client whole after the loss has occurred or damage has been done.

In the interim, the client has been without the use of the money and has generally incurred expenses and sustained considerable inconvenience in trying to have the attorney rectify the matter.

The delayed repayment, repayment in installments or even efforts to repay with interest do not undo the initial misconduct. While every effort should always be made to make full restitution, such efforts go more properly to consideration of mitigation factors bearing on the degree of discipline, rather than in excusing the initial misconduct itself. See In re Ziegler, No. 33442-A (Mich. St. B. Grievance Bd. 1976).

It is not necessary that our Order of Discipline contain a specific date on which it shall end. Del Rio, supra, State Bar of Michigan v Lavan, 384 Mich 624, 186 NW2d 331 1971). In In re Ruebelman, No. 33692-A (Mich. St. B. Grievance Bd. 1977), aff'd, 402 Mich 501, 265 NW2d 161 (1978), the Board found that failure to take any action for filing an account or closing an estate over six years after appointment as administrator, and failure to pay taxes on estate property warranted a suspension for a fixed term and until the estate was closed. Our Order here is sufficiently definite when it indicates that the suspension will end when the estate of Herman E. Speerstra, Probate File 75 58, Probate Court for Gratiot County, is closed, and when the Attorney Discipline Board receives a copy of the probate court order closing the estate.

The findings of the panel are affirmed and discipline increased to 120 days and until the Speerstra estate is closed.

AFFIRMED AS MODIFIED.