IN THE MATTER OF ARTHUR R. REIBEL,
A Member of the State Bar of Michigan,
Respondent,
No, DP-141/80

Decided: July 30, 1981

OPINION OF THE BOARD

Respondent was accused of charging or collecting an illegal fee, failing to segregate the funds of Complainant, posting bond in his own name on behalf of a client, and failing to pay to Complainant funds to which the Complainant was entitled. The 46th Circuit Hearing Panel sustained all charges but those of excessive fee and posting of bond, suspended Respondent for one year, and recommended he undergo recertification by the Board of Law Examiners. Respondent petitioned for review. We reverse on the issue of bond, affirmed the findings of fact, and reduce Respondent's suspension to ninety days with no requirement for recertification.

I.

This case grew out of events during the week of February 19-23, 1979. Respondent was informed early in the week that a friend, Joel Arvilla, had been jailed in Leelanau County of charges of passing bad checks. Mr. Reibel had performed legal services for Arvilla in the past, and Arvilla still owed him about $2800 for those services. Arvilla wanted Respondent to represent him on She criminal charges, but Respondent hesitated due to the unpaid fees.

Arvilla's court appearance as scheduled for Friday, February 23. Arvilla was concerned that he would lose his job if he could not work until after the appearance. Respondent called the Complainant, Arvilla's sister, on Tuesday, February 20, to tell her that her brother was in jail. During the conversation, Respondent said he hoped he could arrange a 10%, $1200 cash bond for his client. No other specific fees or expenses were discussed. Complainant testified that Respondent told her the $1200 cash bond would be returned to her after Arvilla's court appearance if she supplied the money, panel tr. at 36, but Respondent denies ever promising to return the bond or any other sum. Panel tr. at 98-99. Complainant was reluctant to supply the bond, but at Respondent's urging promised to reconsider.

Mr. Reibel testified that he later talked in person to Arvilla's mother on Tuesday, February 20, and rejected her suggestion that he handle the case for a $500 fee. Respondent believes he mentioned a $2500 fee both to Arvilla and to Arvilla's mother, but is uncertain whether he ever quoted such a figure to Complainant. Panel tr. at 95.

Mr. Reibel learned on Wednesday, February 21, that the magistrate would accept a 10% cash bond. He then received a telephone call from Complainant with the news that she was prepared to supply the bond. Respondent explained that Complainant could best assist her brother by also presenting the costs, restitution, and fees needed at his court appearance. The total amount required was about $2,600.[1] Panel tr. at 37. During this conversation, Complainant itemized on the back of an envelope the sums Respondent quoted [2]. See Exhibit B. She gathered a total of $2600 in cash from her mother, another brother, and her own funds,[3] and brought the money to Respondent's office at mid-day on Wednesday, February 21. During a brief meeting at the office, Mr. Reibel gave her a general receipt for the $2,600.[4] Complainant believes Respondent again told her the $1,200 would be returned. Respondent says he considered $2,500 of the $2,600 sum his fee for handling the matter, and the other $100 a contribution toward costs. Panel tr. at 97.

Mr. Reibel admits posting the $1,200 bond in his own name. Panel tr. at 100; Bd. tr. at 5. He then engaged In a plea bargain by which two of the three cases against his client were dismissed.[5]

Arvilla was sentenced to pay costs, restitution, and fines In the third case and restitution to the defrauded complainants In the dismissed cases. All of this totaled $536.68. On Friday, February 23, Respondent received from the court clerk a check for the $1,200 bond money which he immediately endorsed and returned to the clerk for deduction of the $536.68. A total of $663.32, the difference between the full $1,200 bond and the deductions, was then returned to Respondent in cash. Of this, he loaned Arvilla $100 and kept the rest, along with the other $1,400 of the original $2,600 given him by Complainant. Respondent claims that he called Complainant that evening and told her of the day's events, panel tr. at 155, but Complainant presented evidence that she was In Ohio on February 23, and could not have spoken with Respondent.

All agree the Complainant next talked with Mr. Reibel In late March, 1979, panel tr. at 52-52. She was unsatisfied with his explanations,[6] and filed a grievance against him in the summer of that year. The grievance was sent by the Grievance Commission to an upstate attorney for investigation. The Investigator recalls Mr. Reibel telling hid In December 1979 that $1,400 of the $1,963.32 he kept was his fee.[7] Panel tr. 176. Respondent admitted that the investigator's testimony was "fairly accurate." Panel tr. at 212.

The investigating attorney advised Respondent that he should return to Complainant the $563.32 of the bond money he had retained, but did not represent that this would prevent the Grievance Commission from pursuing the case. In March 1980, Complainant received a check for $563.32 and accompanying letter from Respondent. The letter explained that Respondent considered the amount "payment in full." Exhibit 13. The back of the check was also marked "Payment in full of any and all obligations between Arthur R. Reibel and Denis Erin Arvilla." Panel tr. at 56; Exhibit D. Complainant cashed the check nevertheless, although she still believed Respondent owed her the remainder of the $1200.

After Complainant filed her grievance, an attorney at the Grievance Commission sent Respondent a letter, dated January 11, 1980, Exhibit 9, saying the investigator had informed him Respondent would repay the $563.32. Respondent claims this letter constituted an admonishment. A later telephone conversation between the attorney and Respondent was interpreted by Respondent to mean that if the sum were refunded, the grievance would not be pursued. The Grievance Commission denies that such an agreement was ever made.

II.

The testimony of Respondent and Complainant diverges widely in some areas; however, the record supports a finding that the money given Mr. Reibel was intended to be used as Complainant thought partly for bail, and partly for restitution on Arvilla's behalf. Complainant noted the various figures quoted by Respondent in the conversation of Wednesday, February 21.[8] It is unclear where Complainant would have obtained such precise figures, if not from Respondent. In fact, Mr. Reibel admitted giving her such a breakdown of funds needed.[9] Panel tr. at 151. He is unsure whether he ever mentioned the $2500 fee to Complainant. Although Respondent claims to have considered $2500 of the $2600 a fee, with the other $100 to be applied toward costs, he did not bill the family to reimburse him for the additional costs taken from his "fee" on Friday, February 23.[10]

In ascertaining the terms of the agreement between Respondent and Complainant, "we judge by an objective standard, looking to the expressed words of the parties and their visible acts." Goldman v Century Insurance Co., 354 Mich 528, 535, 93 NW2d 240, 243 (1958). Using this objective standard, we think it reasonable for Complainant to have concluded that she would have the $1200 bond money returned to her in full, and that the remaining $1400 would be used for costs, restitution and fees.[11]

Michigan Informal Ethics Opinion CI-374 (November 1978), suggests that attorneys keep "an appropriate written record" of cash retainers received from clients, and deposit such retainers

in a separate bank account. See DR 9-102(A). If Respondent viewed $2500 of the sum received from Complainant as a fee, he did not comply with this standard. A non-itemized receipt was the only "written record" pertaining to the sum, and none of the funds were deposited in a special account.

Respondent admits having posted bond In his own name. This is a violation of MSA Sec. 27A. 2665; MCL Sec. 600.2665; see Michigan Informal Ethics Opinion CI-365 (October 1978). The hearing panel noted in its report:

> "Respondent admitted posting the criminal bond in his own name which is in violation of the statutes the Panel finds that the Grievance Commission did not pursue this issue with the proofs necessary to conclude that the Respondent Intentionally violated the cannons [sic] of Ethics for the code of professional responsibility as to this point."

We reverse this conclusion. Once Respondent admitted the allegation, no further proofs were necessary.

In March 1980, Respondent sent to Complainant a check for $563.32 and accompanying letter, both marked "payment in full." Complainant deposited the check after some hesitation, but apparently did not strike out the words of accord, nor add words of protest to the endorsement. Michigan's law of accord and satisfaction is currently in a state of flux, see Fritz v Marantette, 404 Mich 329, 273 NW2d 425 (1978); 26 Wayne L. Rev. 1067 (1980). Nevertheless, even if Complainant's actions were sufficient to conclude an accord and satisfaction under civil law, there is no corresponding "accord and satisfaction" In the disciplinary context. It is sufficient that Complainant expressed her concerns to the Grievance Commission before cashing the check, panel tr. at 55-56, and has more or less consistently claimed entitlement to the entire $1200. The purpose of disciplinary proceedings is not to litigate the current legal rights of the parties but to determine if an attorney has committed misconduct under the Court Rules and Code of Professional Responsibility. In the present case, Respondent's withholding of the Complainant's funds for more than a year constitutes misconduct, even If the dispute between the parties would be deemed settled by accord and satisfaction outside of the disciplinary forum.

III.

Despite Respondent's conversation with counsel at the Grievance Commission, we do not think that any form of oral stipulation on ending proceeding was reached. This is an issue of fact, but the panel did not make an explicit ruling on the point in its report. The matter had progressed beyond investigation and several letters had already been exchanged between Respondent and the Commission. There is also evidence from these letters that the Commission expected Respondent to repay more than he did, and that Respondent did not meet the conditions of the purported agreement.

Respondent claims that the letter from the Grievance Commission of January 11, 1981, was an admonishment, and precluded further formal action. GCR 1963, 955 provides that with "the respondent's consent, the administrator may admonish the respondent without filing a Complainant." The letter was not an admonishment. It was not labeled as such. Nor has Respondent suggested that he was formally notified an admonishment was contemplated, or that he gave his consent. These elements must be present for an admonishment to exist.

IV.

Although the misapplication of funds requires substantial discipline, a suspension of one year Is too severe In light of all the surrounding circumstances. Respondent overreached in applying Complainant's bond money toward his fee, but did carry out his legal services to the satisfaction of the client, and neither the sum retained by Respondent, $1400, nor the sum Respondent sought to keep, $1963.12, can be called unreasonable or excessive as a fee.

We recognize that the misapplication of funds by an attorney is a serious offense. The Board has considered the mitigation of an unblemished record, Fazio v Schwartz, Nos. DP-105/80; DP-143/80 (Mich. ADB 1981); In re Charlip, No. 26340-A (Mich St BG Bd 1976), and accomplishment of substantial legal services for the client. See Schwartz v Helm, No. 36292-A (Mich ADB 1980) (Helm successfully negotiated with client's creditors, although without authority). We also noted that return of the $535.68 was at least partial restitution, albeit after a grievance had been filed. Schwartz v Molette, No. 35391-A (Mich ADB 1981); Schwartz v Smith, No. 35166-A (Mich ADB 1980).

In assessing discipline, the panel stated:

> "It is the further recommendation of the Hearing Panel that if or when Respondent petitions for reinstatement pursuant to GCR 972.2, he be required to be recertified by the Board of Law Examiners pursuant to the Intent set forth in GCR 972.2(8).
>
> ... The Hearing Panel would request that Mr. Reibel be recertified by the Board of Law Examiners as a prerequisite to reinstatement. The authority cited for this in light of the one year suspension is GCR 972.2(1) and (6)."

[Emphasis added.] GCR 1963, 972.2(1) requires an attorney seeking reinstatement to establish that he desires in good faith to be restored to the bar; and 972.2(6) requires him to show that he has a proper understanding of and attitude toward the ethical standards imposed on attorneys, and that he will conduct himself according to those standards. These provisions do not justify a recertification recommendation with a suspension of less than three years. GCR 1963, 972.2(8) provides that "for a suspension of 3 years or more, [the Respondent shall be] recertified by the Board of Law Examiners." See In re Reinstatement of Albert, 34422-A (Mich ADB 1979).

Although the Board finds the general comments and observations of a panel to be a helpful adjunct to the record on appeal, see Schwartz v Goldberg, No. DP-2/80 (Mich ADB 1981), a recommendation for recertification has no effect in any case where the suspension is less than three years, and especially where, as here, it is not based upon a demonstration of a Respondent's incompetence.

Respondent is suspended for ninety days, with no requirement of recertification.

AFFIRMED IN PART AND REVERSED IN PART.

FOOTNOTES

1. Complainant testified that the amounts quoted by Respondent were as follows:

Bond	$1200.00
Bad Check 111	200.00
Bad Check 112	$133.13

Bad Check 113	30.00
Court Costs	500.00
Attorney Fees	$500.00
	$2563.12

Panel tr. at 38. Complainant apparently thought It most convenient simply to give Respondent a round figure of $2600.

2. See Exhibit B. The rear of the envelope has many hastily written figures on It. Eight were later boxed by Complainant to draw attention to them for the purpose of the Investigation. These are:

$1563.12	$1200.00	200
$500.00		
$500.00	$133.12	
$2563.12	$30.00	

Complainant testified that the figures represent the following: $1200 bond money; $200, $133.12, and $30.00 total restitution for the four bad checks (see notes 5, and 8, infra); $1563.12 was the sum of the bond money and restitution; $500.00 each for court costs and attorney fees; $2563.12 for the overall total. Panel tr. at 38-48.

3. Complainant testified that, of the $2600.00 she contributed $800.00 of her own funds, her other brother contributed $300.00, and their mother $1500.00. Panel tr. at 71.

4. See Exhibit C. The receipt, dated February 21, 1979, stated "The undersigned hereby acknowledges receipt of Twenty-Six Hundred ($2600.00) dollars with regard to: PEOPLE OF THE STATE OF MICHIGAN VS. JOEL WILLIAM ARVlLLA 86th District Court for the County of Leelanau Cases Nos. 2079, 2877 and 2878." Respondent signed the receipt. No breakdown of the $2600.00 was made on the document, and fees were not mentioned.

5. Arvilla was charged under one warrant, file no. 2079, dating from July 1976, and two other warrants, files 2877 and 2878 from January 1979. These latter two were dismissed pursuant to the plea bargain after restitution was made. Panel tr. at 27.

Arvilla paid the following costs and restitution to the court on Friday, February 23, 1979;

$336.68	Restitution to four complainants on the bad check charges
(30.00)	(restitution to "Blue Bird")
(133.12)	(restitution to "The Lelander")
(18.00)	(restitution to "Fisherman's Cove")
(155.56)	(restitution to "Falling Waters Lodge")
$200.00	Court fines and costs
$536.68	Total returned to court from the $1200.00 bond

6. Complainant testified that Respondent told her during the March conversation that "everything had been cleared up." When questioned about the $1200.00 bond, he answered that it had "been taken care of," and there were unexpected costs involved that would be taken from the bond, but that Complainant would be getting back "some of what was left."

Respondent then promised to send Complainant a letter explaining the situation in detail, but never did. Panel tr. at 52-53.

7. Respondent apparently reduced his "fee" twice from the $2500.00 figure he originally contemplated. After receiving $663.32 back from the bond money, and loaning Arvilla $100, Respondent was left with $563.32 plus the $1400.00 in "costs, fees, and restitution" remaining from the $2600.00, He was apparently satisfied with this $1963.32, as neither Arvilla nor the family was subsequently billed for the remainder of the $2500.00. After repaying Complainant $563.32 in March 1980, Respondent ultimately kept $1400.00 as his fee. Respondent's testimony concerning his fee, however, seems to indicate that he is not entirely satisfied with this state of affairs.

> A. . . . I felt I had additional monies coming because I had taken part of the retainer fee to pay the restitution, fines and costs which reduced my fee. And I felt I had additional fees coming which I never received, of course.

Panel tr. at 101.

> Q. Are you telling us, sir . . . that your full bill has been paid?
> A. No.
> Q. It has not been paid?
> A. It has not been paid.
> Q. . . . the unpaid amount on your bill according to your testimony would be what?
> A. Four hundred and sixty-some dollars, the differences between twenty-six hundred dollars less the amounts paid but, subtracted from the twenty-five hundred.
> Q. So basically you had four hundred or five hundred dollars coming from Joel?
> A. I still do today.

Panel tr. at 129-30.

8. See notes 1, and 2, supra. The figures noted on the envelope, $30.00, and $133.12, match exactly two of the payments eventually made in restitution on bad checks. The other figure, $200.00 is an approximate sum of the two other bad checks to be paid in restitution, $18.00 plus $155.56.

9. Respondent admits giving Complainant the figure, but denies having done so on Wednesday, February 21. He claim the figures were quoted during the alleged conversation of Friday, February 23, which Complainant has satisfactorily demonstrated did not occur.

10. The apparent expectations of the Respondent and Complainant on the use of the $2600.00 are summarized as follows:

Complainant		Respondent	
$1200.00	bond (to be returned in full)	$2500.00	fees (from which $1200 bond would come)
$ 500.00*	attorney fees		
$ 500.00*	court costs	$ 100.00	towards costs and restitution
$ 400.00*	restitution		
$2600.00		$2600.00	

*Complainant did not expect to have returned to her.

11. See Complainant's testimony at panel tr. at 63-64:

Q. Do you think here is any room for ambiguity, what Mr. Reibel's understanding was of the twenty-six hundred dollars? Do you believe there is any room for ambiguity in this matter, that is that there may have been a misunderstanding?
A. I don't understand what you are saying.
Q. Do you believe that there was any room in this arrangement between you and Mr. Reibel --
A. Okay.
Q. -- that would -- do you believe there is any room in there for misunderstanding as between the two of you as to the disposition of the twenty-six hundred dollars?
A. At the time I did not. I don' t understand what you are saying. No.
Q. It is a fair answer
A. I don' t really understand what he is saying. I gather no, there was not at the time any ambiguity. I didn't think there was any misunderstanding.
Q. If you will bear with me, I am not saying ambiguity in your mind. But the facts and circumstances as you now perceive them, that is two telephone conversations, okay, and a receipt that say twenty-six hundred dollars without any specificity in it as to how those funds were to be appropriated or arranged. Does that suggest to you that there is room in this case for a misunderstanding between the parties as to the application of the funds?
A. No.
Q. No room?
A. No. .. There is no misunderstanding.
Q. I am not talking about you, but about Mr. Reibel.
A. No, no, no.