IN THE MATTER OF HARRY T. WARD,
A Member of the State Bar of Michigan,
Respondent.
No. 34204-A

Decided: May 21, 1980

OPINION OF THE BOARD

Respondent was consulted by Mrs. Levella Dean in 1969 concerning an action against the Detroit Police Department. Mrs. Dean's son, then a minor, had been shot and seriously injured by a police officer while allegedly fleeing the scene of a burglary. Another attorney hired by Mrs. Dean before she contacted Respondent made no progress with the case, which he concluded was hopeless to pursue. Mrs. Dean and Respondent agreed that Respondent's fee would be 50% of any recovery. The previous attorney had also set 50% as his fee. Respondent did not secure a written contract but made a notation on his interview sheet to the effect that the 50% figure had been agreed upon. After much work on Respondent's part before and during trial, the sum of $325,000 was offered and accepted in late 1975 for settlement by the city. The 50% fee had been discussed several times during the proceedings with the Deans, as well as the trial judge, who expressed his approval of it. Shortly before Mrs. Dean's son (who had since attained the age of majority) received his portion of the settlement, the Dean family filed a grievance with the Grievance Commission, alleging the fee was unfair.[1] Neither the hearing panel nor Grievance Board subsequently found misconduct. Mrs. Dean then wrote to the Michigan Supreme Court which, in September, 1978, remanded the case to the Attorney Discipline Board, in lieu of granting leave to appeal.

The charge of misconduct is based upon Respondent's apparent violation of GCR 928, which sets out a schedule of maximum contingent fees in actions for personal injury or wrongful death. The Rule came into effect several months before Respondent reached a settlement in the Dean case. Respondent's 50% fee is considerably above the schedule outlined in 928.2.[2] Rule 928.1 provides that "receipt, retention, or sharing of compensation which is in excess of such scheduled fees [in .2] 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 and Canons."

The Rule specifies in .7, however, that it "does not apply to agreements reduced to writing before May 3, 1975." Although both parties stipulated to the presence of the notation indicating the 50% figure, the Supreme Court, in its order of remand, determined that "the attorney's notes on his client's file to the effect that the fees to be charged would be 50% of any recovery does not constitute an agreement reduced to writing' within the meaning of GCR 1963, 928.7." Accordingly, on remand to a hearing panel, it was concluded that there was not a sufficient writing to satisfy GCR 928.7, that there was a technical violation of the Code, but under "the facts and circumstances in this case [there is no justification for] the imposition of discipline by this panel under the rules." We are forced to disagree, and regretfully impose a reprimand.

In a sense, the dispositive issue before us is narrow and easily decided. The hearing panel concluded that there had been a "technical" violation of the Code. GCR 964.10(2) requires that if

"the hearing panel finds that the charge of misconduct is established by a preponderance of the evidence, it must enter an order of discipline . . ." [Emphasis added.] The panel has no discretion in the matter, in the absence of a showing in mitigation. In re Lewis, 389 Mich 668, 209 NW2d 203 (1973); In re Sauer, 390 Mich 449, 213 NW2d 102 (1973).[3] The record reveals no mitigating evidence. Indeed, the essence of Respondent's defense Is that GCR 928 is unconstitutional insofar as it appears to retrospectively impair the obligation of contracts. Board Record at 38.

We believe GCR 928 is a constitutional exercise of the Supreme Court's power in its "exclusive constitutional responsibility to supervise and discipline Michigan attorneys." GCR 959.1. In his brief, Respondent rested his constitutional argument on three grounds: (1) as far as GCR 928 impose a substantive fee schedule for certain types of cases, it violates Art. III, Sec. 2 and Art. VI, Sec. 5 of the Michigan Constitution; (2) GCR 928.7's retrospective application is an unreasonable impairment of contracts under Art. I, Sec. 10 of the U. S. Constitution, and Art. I, Sec. 10 of the Michigan Constitution; and (3) by differentiating between agreements reduced to writing before May 3, 1975, and those not reduced to writing, the Rule violates the Equal Protection Clause of the Fourteenth Amendment.

Respondent does not question the authority of the Supreme Court to supervise Michigan attorneys. He argues that, under the state constitution, the setting out of a substantive fee schedule is a legislative function. While the setting of rates is generally left to the legislature as Respondent points out, the legal profession does not fall under the general rule. Whether or not the "learned profession" exception still applies to the legal profession is a question we need not decide. It is clear enough that the Supreme Court has wide latitude to make reasonable rules under its power to regulate the bar; wider power than it would have over another profession. Attorneys, as officers of the court, are in a peculiar position in regard to state regulation. As Justice Holmes wrote in Hudson County Water Co. v McCarter, 209 US 349, 357, 28 S Ct 529, 52 L Ed 828 (1908), "One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State [sic] by making a contract about them. The contract will carry with it the infirmity of the subject matter." The privilege of practicing law is granted, and regulated, by the state through its Supreme Court. Among its powers is the ability to set out a substantive fee schedule for attorneys, end subject members of the bar who violate the schedule to disciplinary action.

Respondent's arguments under the Contract Clause and Equal Protection Clause are, we think, without merit. GCR 928 impairs no contracts, either prospectively or retrospectively. It outlines the boundaries beyond which attorneys may not go in charging fees without leaving themselves open to disciplinary action. Potential considerations of unconscionability aside, any attorney may transgress the Rule and conclude a valid contract, written or oral, for whatever percentage contingent fee he pleases. It is true that he may be disciplined for having done so, but the validity of the contract itself is not destroyed by the Rule.[4] The crux of the Rule is that fees charged in excess of the schedule "shall be deemed to be the charging of a 'clearly excessive fee'" in violation of the Code. No contracts, past or future, are impaired as a matter of law by the Rule.[5] By logical extension of Respondent's view, it might be argued that the Code of Ethics itself impairs the obligation of contracts by forbidding "excessive fees," though in a less explicit manner. Art. I, Sec. 10 of the a. 5. and Michigan Constitutions have certainly never operated to prioritize contracts

over matters of important public policy; therefore, even if GCR 928 did retrospectively impair the obligation of Respondent's contract, it would remain constitutionally valid.

The first inquiry in viewing a state act, purportedly impairing the obligation of contracts, is to examine whether the act has actually operated as a substantial impairment. "Minimal alternations of contractual obligations may end the inquiry at its first stage." Allied Structural Steel v Spannaus, 438 US 234, 245, 98 5 Ct 2716, 57 L Ed 2d 727 (1978). As mentioned above, GCR 928 impairs no contract at all but, even if it did reduce client Dean's obligation to Respondent from $162,500 to $98,250, it is questionable whether this is an impairment which deprives Respondent of reasonable remuneration for his services. The validity of the Rule having been established, we will look somewhat further into the constitutional argument.

Respondent relies upon the recent U.S. Supreme Court case, of Allied Structural Steel v Spannaus, supra, for the proposition that the five criteria enumerated in Home Building & Loan Association v Blaisdell, 290 US 398, 54 S Ct 231, 78 L Ed 2d 413 (1934),(e.g., the presence of an emergency), were absolute prerequisites for the action of a state in the retrospective impairment of contracts. However, the Court in Allied acknowledged the existence of an emergency as only one factor which may justify a state's exercise of its police power to affect private contracts; the Court did not suggest that only an emergency situation could constitutionally justify a state action impairing the obligation of contracts. See generally, Annot. 57 L Ed 2d 1279 (1979). The existence of an emergency, then, is not a necessary prerequisite for such an exercise of state power.

It is unquestioned that the purpose of GCR 928 the regulation of the legal profession is a necessary and legitimate public purpose. The clear intent of a regulation to protect a basic interest of society, as opposed to a special interest, tends to establish its necessity and reasonableness. Allied. Even if GCR 928 constitutes a substantial retrospective impairment of the obligation of contracts, it would remain valid as a reasonable and necessary measure for the "protection of the public, the courts, and the legal profession." GCR 954.

Similarly, the Equal Protection Clause is not an impediment to the validity of fee restrictions. The distinction drawn between written and parol agreements by the Supreme Court in part .7 is "reasonable, not arbitrary" and bears a fair and substantial relation to the object of the rule. If contingent fees are to be prospectively set at a maximum for disciplinary purposes, there must be some evidentiary provision made for those past fee agreements in excess of the new allowable ark. This is more for the protection of attorneys than of the public.[6]

While Supreme Court rules are open to constitutional scrutiny, Wolodzko v Burdick, 382 Mich 528, 170 NW2d 9 (1969), we believe that Respondent's constitutional challenge to GCR 928 has no merit. Of course, the Supreme Court itself may wish to re-examine and amend the Rule.

Respondent raised a number of other issues in his brief and in oral arguments which we need not address. One of these is the power of this Board to find a court rule unconstitutional. Although we observe that the Rule would be constitutional even if it did substantially impair the obligation of contracts, we feel that this case may be decided independently of this issue, and will not address the limits of our authority In this regard.

As to Respondent's knowledge of the Rule's existence, we point out that all members of the bar are charged with notice of the rules under which they practice. Respondent's counsel admitted this Board record at 34. GCR 928 took effect in early May, 1975. 54 Mich St Bar J 327 (May 1975). The previous month's edition of the Bar Journal carried a notice about the Rule;[7] if Respondent was not there by advised, as all members of the Bar should have been, or if he received late notice, he could have raised this in mitigation before the hearing panel. Nevertheless, as previously indicated, we impose this reprimand with regret. Respondent is a competent and respected attorney and recovered a large sum in a difficult case.

In summary, we find:

(1) That under GCR 964.10(2) we must impose discipline following the finding of even a "technical" violation;

(2) That the Supreme Court has the power to set out a substantive fee schedule for members of the Bar;

(3) That GCR 928 does not, as a matter of law, impair the obligation of contracts, but is purely an extension of the disciplinary rules for the regulation of the Bar;

(4) That even if GCR 928 did retrospectively impair the obligation of Respondent's contract with his client, such did not result in an unreasonable fee for the services rendered;

(5) That even if the Rule does substantially impair the obligation, it is a valid, constitutionally-balanced measure necessarily taken for the protection of the public, the courts and the legal profession; and

(6) That the fee restriction does not violate the Equal Protection Clause.

FOOTNOTES

1. The Deans have instituted civil proceedings to recover a portion of the fee from Respondent. Attorney Discipline Board record of January 31, 1980.

2. Under GCR 928.2, an attorney may arrive at a contingent fee one of two ways. In .2 (2), "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 . . ." Under this system, Respondent could permissibly have charged a maximum of $98,250.

3. Both cases provide that a respondent must be allowed to enter mitigating evidence if he wishes, and that if the hearing panel decides discipline should not be imposed after considering the mitigating evidence, it may so order, even if a "technical" violation of the Code has been shown. This is apparently the only exception to the GCR 964.10(2) requirement that discipline must always follow a finding of misconduct.

4. See, e.g., note 1, supra. Respondent's parol contract for a 50% fee was not destroyed prima facie by GCR 928. Neither the Supreme Court in its order of remand nor the hearing panel upon remand indicated that Respondent did not have a valid contract, but only that there was no writing sufficient to satisfy the Rule. Respondent himself admits "there is no dispute as to the existence of a contract, the terms of which [have] been stipulated to." Brief for Respondent at 12. Under the court rules, neither the Board nor hearing panel has the authority to impair the contract by ordering Respondent to return the excessive portion of the fee to the Deans. See GCR 955. If the Deans recover in circuit court, it may not be directly because of GCR 928. If the questioned measure does not actually diminish rights or Increase duties under the contract, its effect cannot be said to constitute impairment within the Contract Clause. 57 L Ed 2d at 1290-91.

5. If GCR 928 impairs anything touching Respondent's contract, it tends to impair his remedy. Section 1 specifies that the "receipt, retention, or sharing of compensation which is In excess of such scheduled fees shall be deemed to be the charging of a 'clearly excessive fee.'" An attorney may draw up a contract for any percentage contingent fee without risk of discipline. It is only if he collects (not attempts to collect) monies above those allowed that he is exposed under the Rule. The Rule goes not to the formation of the contract or to the obligations, but to the enforcement of the remedies.

   The U. S. Supreme Court has consistently held that a state may impair the remedies of contracts. "[A]lthough the means of enforcing contracts may not be totally destroyed or altered to such an extent as to substantially impair contractual rights, nevertheless, remedies may generally be changed without unconstitutionally impairing existing private contracts." 57 L Ed Id at 1283-84. McGee v International Life Ins. Co., 355 US 220, 78 S Ct 199, 2 L Ed 2d 223 (1957). [Emphasis supplied.]

6. The evidentiary nature of the distinction between written and oral agreements is not a retrospective application of the Statute of Frauds. Brief for Respondent at 9. While the

Statute of Frauds prevents the enforcement of contracts under certain circumstances, GCR 1963, 928.7 does not block the enforcement past unwritten agreements, as a matter of law, but only applies its Sec. 1 as an extension of DR 2-106(A). It is purely an evidentiary distinction for disciplinary purposes, and not designed for use in a court of law.

7. 54 Mich St BJ 169 (April 1975).

L. SHECTER CONCURRING

I am unpersuaded by the obligations/remedies distinction. If collecting upon a judgment subjects the attorney to the risk of discipline, the encumbrance upon his remedy is severe. He must choose between endangering his livelihood and receiving what, under contract law, he is entitled to receive. This is a genuine impairment. While a state may enlarge, limit, or alter ways of proceeding and forms to enforce contracts, it may not deny a remedy or so burden it with conditions as to seriously reduce the value of the right. Thorpe v Housing Authority of Durham, 393 US 268, 89 S Ct 518, 21 L Ed 2d 474 (1969). [Emphasis added.]

Respondent's contract was, in reality, substantially impaired. Under the Rule, the highest fee he could charge without subjecting himself to discipline was $98,250, some $64,250 less than the amount he collected. For the effort and work invested in his case, and the costs he advanced, see Stipulation E of the parties, it is not altogether clear whether the $64,250 reduction is reasonable under the circumstances.

"If the Contract clause is to retain any meaning at all it must be understood to impose some limits upon the power of a State to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power." Allied Structural Steel v Spannaus, 438 US 234, 241, 98 S Ct 2716, 57 L Ed 2d 727 (1978). GCR 928 has actually impaired Respondent's contractual rights, in having forced him to choose between subjecting himself to discipline and retaining what was owed him under a valid contract. However, Respondent did make his choice and, even if he saw himself as a "test case," he must be prepared to accept the consequences. His violation of the Rules is clear, and discipline must follow. The Rule itself, should be re-evaluated by the Supreme Court.