STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellant,

v

Angela Whitaker, P 54944,

Respondent/Appellee,

Case No. 15-155-GA

Decided: August 3, 2017

Appearances:

Nathan C. Pitluk (on review) and Frances A. Rosinski (at hearing), for the Grievance Administrator, Petitioner/Appellant
John F. Early, Jr., for the Respondent/Appellee

BOARD OPINION

Tri-County Hearing Panel #12 entered an order of dismissal in this matter on March 7, 2017. The order was accompanied by the hearing panel's report containing its findings that the charges of misconduct in the formal complaint were not established by a preponderance of the evidence. The Grievance Administrator petitioned the Attorney Discipline Board for review on the grounds that the hearing panel erred in finding insufficient evidence of fee sharing between respondent and a nonlawyer, in violation of MRPC 5.4, and in finding that respondent's failure to appear at court ordered hearings, as set forth in Count Four of the formal complaint, did not violate MRPC 1.1(b)[1] and (c), MRPC 3.4(c) and MCR 9.104(1).

The Attorney Discipline Board has conducted review proceedings in accordance with MCR 9.118, including review of the record before the hearing panel and consideration of the briefs and

[1] The Administrator's brief in support of his petition for review cites to MRPC 1.1(b), however, that rule was not listed as having allegedly been violated in Count Four of the formal complaint.

arguments of the parties at a hearing conducted before the Board on June 21, 2017.

On review, the Attorney Discipline Board must determine whether the hearing panel's findings on the issues of misconduct have evidentiary support in the whole record. *In re Daggs*, 411 Mich 304, 318-319 (1981); *Grievance Administrator v August*, 438 Mich 296, 304; 475 NW2d 256 (1991). "This standard is akin to the clearly erroneous standard [appellate courts] use in reviewing a trial court's findings of fact and civil proceedings." *Grievance Administrator v Lopatin*, 462 Mich 248 n12 (2000). Under the clearly erroneous standard, a reviewing court cannot reverse if the trial court's view of the evidence is plausible. *Thames v Thames*, 191 Mich App 299, 301-302 (1991), lv den 439 Mich 897 (1991).

> In applying the appropriate standard of review of a panel's factual findings, it is not the Board's function to substitute its own judgment for that of the panels' [sic] or to offer a de novo analysis of the evidence. When . . . the panel's decision to dismiss certain counts has evidentiary support, that decision should be affirmed. [*Grievance Administrator v Carrie L.P. Gray*, 93-250-GA (1996), p 3.]

The limitations placed on fee sharing with nonlawyers referenced in MRPC 5.4 are intended to protect a lawyer's professional independence of judgment, presumably by limiting the influence of nonlawyers on the lawyer/client relationship. In this matter, the formal complaint essentially alleged that respondent engaged in fee sharing with a nonlawyer, Vernon Taylor, because he was allegedly paid based on the number of bankruptcy petitions filed, at the rate of 50% of payment received for those petitions. This was the theory the Administrator's counsel maintained throughout the proceedings. In support of that theory, the Administrator admitted exhibits consisting of certain receipts for payments respondent made to Mr. Taylor, (Petitioner's Exhibits 6, 9, 13), and questioned respondent about how Mr. Taylor was paid for the services he provided.

Respondent testified that Mr. Taylor was not her employee, but rather an independent contractor (to whom she now issues a 1099 to for tax purposes), that she could not afford to pay Mr. Taylor an hourly rate, that he worked approximately 30 hours per week, and that it "worked out to" approximately $10 per hour. While respondent admitted that in some cases the payment made to Mr. Taylor amounted to approximately 50% of monies received from the client,[2] she maintained that she

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[2] Respondent also acknowledged that in the Foushee matter, Mr. Taylor was ultimately paid more because her matter was converted from a Chapter 13 case to a Chapter 7, thus the amount paid to him equaled more than 50%. (Tr 8/11/16, pp 103-104.)

had no agreement with Mr. Taylor to pay him a predetermined percentage or that he was ever paid, especially as an incentive for an increase in pay, based on the number of bankruptcy petitions filed. (Tr 8/11/16, pp 65-66, 103-104, 214-215.)

The Administrator argues that there is "abundant evidence" that respondent shared 50% of the legal fees with Mr. Taylor and points to the receipts of payments made to Mr. Taylor reflected in Exhibits 9 and 13. However, beyond asking respondent to identify the receipts in the exhibits, respondent was never asked to further explain why Mr. Taylor was paid what he was in each matter referenced in the receipts. (Tr 8/11/16, p 67.) Additionally, no further evidence was admitted or questioning occurred to determine whether the amounts reflected in those receipts in fact equaled 50% of the fees paid by the client referenced on the receipt. Moreover, the legal basis for misconduct is lacking. The issue is not whether Mr. Taylor was paid by a fixed fee or hourly wage. The former is not per se "fee sharing" while the latter is automatically permissible. The issue is whether Mr. Taylor is being compensated for paralegal work or for drumming up cases.

As noted by the hearing panel, Mr. Taylor was inexplicably never called as witness:

> Mr. Taylor did not testify at the hearing and the only testimony given . . . was that of respondent, who testified that she closely supervised Mr. Taylor's activities and did not authorize him to provide legal advice to her clients. It was also alleged that respondent shared legal fees with Mr. Taylor. Again, Mr. Taylor did not testify at the hearing and respondent vehemently denied this allegation.
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> Petitioner failed to introduce into evidence any type of agreement between respondent and Mr. Taylor that would support the allegation that respondent was sharing legal fees with Mr. Taylor. Respondent testified that she could not afford to pay Mr. Taylor an hourly rate given that the amount of work performed exceeded the payment for services rendered. However, Mr. Taylor was roughly compensated at the rate of $10 per hour. Petitioner did not present any evidence to dispute respondent's assertions. The panel finds the explanation given by respondent plausible. [Report 3/7/17, pp 6-8.]

The record is devoid of any evidence that respondent's independent judgment was ever compromised, and the Administrator did not seek review of the panel's finding that respondent did

not assist a nonlawyer in the practice of law. Based on our review of the record below, and as noted above, there appears to be proper support for the panel's finding that respondent's explanation was plausible and more convincing than the Administrator's argument to the contrary.

Additionally, the cases cited by the Administrator lend little support to the Administrator's position. The cases reference specific agreements to "share" contingency fees, compensation based on total number of weekly bankruptcy cases filed with increasing incentive bonuses, and predetermined agreements to pay a percentage of legal fees as compensation, scenarios all vehemently denied by respondent in this matter. Instead, the record reveals that Mr. Taylor completed significant work on these bankruptcy matters at respondent's direction and under her supervision, and that he was simply being paid for the services he completed. The Administrator's conclusion that "when a nonlawyer receives a percentage of legal fees it is impermissible fee sharing and violates Rule 5.4(a)," must not only be based on some authority supporting that position, but also on evidence that supports a finding that it is more probable than not that the nonlawyer was in fact paid a percentage.

Our review of the evidence offered by the Administrator before the hearing panel regarding respondent's failure to appear at the particular show cause hearings referenced in Count Four of the formal complaint, leads to the same conclusion reached by the hearing panel; it may have been better practice for respondent to have attended these hearings, but her failure to do so does not appear to have prejudiced her clients or to have amounted to neglect[3] and an "intentional disregard" of the court's orders, in violation of MRPC 1.1(c) and MRPC 3.4(c). (Report 3/7/16, p 7.) Perhaps if the clients had been called as witnesses the outcome of these charges would have been different, but their testimony was never presented.

Again, the cases cited by the Administrator, *Grievance Administrator v Smith*, 92-71-GA (ADB 1994) (reprimand increased to 30-day suspension for willful disregard of orders of the probate court directing respondent to return certain attorney fees taken from a probate estate without proper court authority); and, *Grievance Administrator v Stefani*, 09-47-GA (ADB 2011) (reprimand increased to 30-day suspension for knowingly issuing subpoenas without notice to opposing counsel

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[3] The record is devoid of any evidence that respondent engaged in neglect. In fact, the record indicates that respondent did the exact opposite and made conscious decisions about attending these hearings based on each client's situation.

and in violation of the court's order that materials produced be produced to the court for in camera inspection), in support of his statement that "violating a court order and failing to appear is misconduct," (Grievance Administrator's Brief, pp 17-18) are easily distinguished given the disparity in the particular facts and circumstances of those matters to the instant matter.

After a careful review of the whole record, the Board has concluded that there is ample evidentiary support for the hearing panel's findings that the allegations in the formal complaint were not established by a preponderance of the evidence. The hearing panel's order of dismissal issued March 7, 2017 is affirmed.

Board members Louann Van Der Wiele, Rev. Michael Murray, Dulce M. Fuller, James A. Fink, Barbara Williams Forney, Karen O'Donoghue, and Michael B. Rizik, Jr. concur in this decision.

Board members John W. Inhulsen and Jonathan E. Lauderbach were absent and did not participate.