IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2002 Term

FILED
May 2, 2002
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 27051

RELEASED
May 3, 2002
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

LAWYER DISCIPLINARY BOARD,
Complainant,

v.

BELINDA S. MORTON, A MEMBER
OF THE WEST VIRGINIA STATE BAR
Respondent

Disciplinary Proceeding

Charge Dismissed

Submitted: February 27, 2002
Filed: May 2, 2002

Lawrence J. Lewis
Office of Disciplinary Counsel
Charleston, West Virginia
Attorney for the Complainant

Travers R. Harrington
Fayetteville, West Virginia
Attorney for the Respondent

The Opinion of the Court was delivered PER CURIAM.

CHIEF JUSTICE DAVIS and JUSTICE MAYNARD dissent and reserve the right to file dissenting opinions.

JUSTICE STARCHER concurs and reserves the right to file a concurring opinion.

SYLLABUS BY THE COURT

1. "A *de novo* standard applies to a review of the adjudicatory record made before the [Lawyer Disciplinary Board] of the West Virginia State Bar as to questions of law, questions of application of the law to the facts, and questions of appropriate sanctions; this Court gives respectful consideration to the [Board's] recommendations while ultimately exercising its own independent judgment. On the other hand, substantial deference is given to the [Board's] findings of fact, unless such findings are not supported by reliable, probative, and substantial evidence on the whole record." Syl. Pt. 3, *Committee on Legal Ethics v. McCorkle*, 192 W. Va. 286, 452 S.E.2d 377 (1994).

2. "This Court is the final arbiter of legal ethics problems and must make the ultimate decisions about public reprimands, suspensions or annulments of attorneys' licenses to practice law." Syl. Pt. 3, *Committee on Legal Ethics v. Blair*, 174 W.Va. 494, 327 S.E.2d 671 (1984), *cert. denied*, 470 U.S. 1028 (1985).

3. "In the absence of any real risk, an attorney's purportedly contingent fee which is grossly disproportionate to the amount of work required is a 'clearly excessive fee' within the meaning of [Rule 1.5(a) of the Rules of Professional Conduct]." Syl. Pt. 3, *Committee on Legal Ethics v. Tatterson*, 177 W. Va. 356, 352 S.E.2d 107 (1986).

4. “If an attorney's fee is grossly disproportionate to the services rendered and is charged to a client who lacks full information about all of the relevant circumstances, the fee is ‘clearly excessive’ within the meaning of [Rule 1.5 of the Rules of Professional Conduct], even though the client has consented to such fee. The burden of proof is upon the attorney to show the reasonableness and fairness of the contract for the attorney's fee.” Syl. Pt. 2, *Committee on Legal Ethics v. Tatterson*, 177 W. Va. 356, 352 S.E.2d 107 (1986).

Per Curiam:

This is a lawyer disciplinary proceeding brought by the Lawyer Disciplinary Board (hereinafter "Board") against Ms. Belinda S. Morton (hereinafter "Ms. Morton"), a member of the West Virginia State Bar. A Hearing Panel Subcommittee (hereinafter "Hearing Panel") found that Ms. Morton had violated Rule 1.5(a)(1) of the Rules of Professional Conduct by obtaining a fee of $1,500 from medical payments obtained on behalf of her client, Mr. David E. Willis (hereinafter "Mr. Willis"). The Hearing Panel recommends that Ms. Morton be publicly reprimanded, ordered to repay the client $1,500, and pay the costs of this proceeding. Based upon thorough consideration of this matter, we reject the recommendation of the Hearing Panel and dismiss the charge against Ms. Morton.

I. Facts and Procedural History

On October 26, 1995, Mr. Willis was a passenger in an automobile that collided with a tractor trailer owned by H & W Trucking Company and operated by Mr. Donald F. Reed.[1] Mr. Willis sustained injuries as a result of the accident. On October 30, 1995, Mr. Willis retained Ms. Morton to represent him in a legal action against the trucking company and its

[1]The automobile in which Mr. Willis was riding was driven by Mr. Willis' wife, Dorothy Willis. Mr. Willis' son-in-law, Mr. Jimmy Ranson, was also a passenger in the vehicle. It appears that all three occupants sustained injuries in the accident.

driver, Mr. Reed.[2] Under the terms of the contingency contract between Ms. Morton and Mr. Willis, Ms. Morton was to receive thirty percent of all monies recovered from any source prior to filing a lawsuit.[3]

In the course of representation of Mr. Willis, Ms. Morton asserts that she prepared and reviewed the contract of representation and explained its terms to Mr. Willis. She also explains that she issued an engagement letter including memorialization of the representation and advice to Mr. Willis concerning maintaining medical bills and the need to avoid contacts and discussion concerning the accident. Ms. Morton's other actions included correspondence with United States Fidelity and Guarantee Company in an effort to place them

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[2]Ms. Morton was also retained by Mrs. Willis and Mr. Ranson. While the Hearing Panel commented that a potential conflict of interest existed among the passengers and the driver, the Hearing Panel did not address that matter since it was not included in the allegations against Ms. Morton.

[3]The retainer contract provided as follows:

> [C]lient desires to employ attorney to institute and prosecute a claim or suit against Donald F. Reed and H & W Trucking Co. Inc., and such other persons, firms, associations, political bodies, governmental units or corporations as attorney, in their [sic] sole discretion, deems desirable or necessary.

Further, the contract provided:

> Client employs attorney to represent him and, if necessary, to institute and prosecute suit and, as compensation for legal services, client agrees to assign unto attorney thirty percent (30%) before suit is filed and forty percent (40%) if a lawsuit is filed of all monies and things of any value recovered in said claim by a compromise, settlement or suit.

on notice of the accident and her representation of Mr. Willis. Ms. Morton also corresponded with medical doctors, Dr. Anwar and Dr. Kominsky, concerning her representation of Mr. Willis and his legal claims. Ms. Morton also explained that she corresponded with State Farm Insurance Company adjuster Elaine Durham, in an effort to prevent State Farm from obtaining an overly broad medical authorization. Ms. Morton also asserts that she conducted legal research and investigation regarding Mr. Willis' claims and conducted several phone calls with various State Farm adjustors regarding Mr. Willis' case. Ms. Morton also prepared for and attended interviews with United States Fidelity and Guarantee claims personnel. Ms. Morton maintains that her representation of Mr. Willis entailed at least forty hours of legal work, including interviews with the client and insurance personnel and review of numerous documents.[4]

During the course of representation, Ms. Morton contacted State Farm, the insurer of the automobile in which Mr. Willis was a passenger at the time of the accident, and asked State Farm to add her name to all medical payment checks issued on behalf of Mr. Willis

[4]The Hearing Panel examined Ms. Morton's contentions regarding work she performed and concluded that she had not demonstrated that the work was directly related to the attempt to obtain medical payments and that such medical payments would have been offered by State Farm even if Ms. Morton had not been involved in the case. Ms. Morton, in response, contends that the Hearing Panel inappropriately divided her representation of the client into two separate issues, the medical payment component and the other liability issues. Ms. Morton maintains that such division is inappropriate, contrary to the terms of the contingency arrangement, and an unfair method of evaluating the issue of excessiveness of legal fees.

and to forward the checks to her office. The medical payment checks totaled $5,000, and Ms. Morton retained thirty percent of that amount, $1,500, as her fee. Ms. Morton's representation of Mr. Willis was terminated subsequent to Mr. Willis' inability to pay a $500 deposit toward costs and expenses as requested by Ms. Morton on September 11, 1996.

Mr. Willis filed an ethics complaint against Ms. Morton on May 15, 1997, contending that her retention of $1,500 of the $5,000 in medical payments obtained for Mr. Willis was excessive. An Investigative Panel thereafter charged Ms. Morton with obtaining an excessive fee in violation of Rule 1.5(a)(1) of the Rules of Professional Conduct.[5] A hearing

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[5]Rule 1.5(a) states, in full, as follows:

> (a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:
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> (1) the time and labor required, the novelty and difficulty of the questions involved, and skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
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> (3) the fee customarily charged in the locality for similar legal services;
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> (4) the amount involved and results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
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> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(continued...)

was held before the Hearing Panel on June 13, 2001, and the Panel subsequently issued its ruling finding that Ms. Morton had violated Rule 1.5(a)(1) by obtaining a fee "grossly excessive for the services actually performed." W.Va. Rules Prof'l Conduct R. 1.5(a)(1). The Hearing Panel and Board have recommended that this Court publicly reprimand Ms. Morton, order her to repay Mr. Willis $1,500, and pay the costs of this proceeding. Ms. Morton has objected to the determination that she violated Rule 1.5(a)(1) and that sanctions should be imposed upon her.

II. Standard of Review

This Court set out the standard of review of lawyer disciplinary proceedings in syllabus point three of *Committee on Legal Ethics v. McCorkle*, 192 W.Va. 286, 452 S.E.2d 377 (1994), as follows:

> A *de novo* standard applies to a review of the adjudicatory record made before the [Lawyer Disciplinary Board] of the West Virginia State Bar as to questions of law, questions of application of the law to the facts, and questions of appropriate sanctions; this Court gives respectful consideration to the [Board's] recommendations while ultimately exercising its own independent judgment. On the other hand, substantial deference is given to the [Board's] findings of fact, unless such findings are not supported by reliable, probative, and substantial evidence on the whole record.

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[5](...continued)

(8) whether the fee is fixed or contingent.

We have also consistently held that "[t]his Court is the final arbiter of legal ethics problems and must make the ultimate decisions about public reprimands, suspensions or annulments of attorneys' licenses to practice law." Syl. Pt. 3, *Committee on Legal Ethics v. Blair*, 174 W.Va. 494, 327 S.E.2d 671 (1984), *cert. denied*, 470 U.S. 1028 (1985).

III. Discussion

With specific reference to this Court's responsibility to review the reasonableness of fees, we observed as follows in *Committee on Legal Ethics v. Tatterson*, 177 W.Va. 356, 352 S.E.2d 107 (1986):

> Contracts for contingent fees, generally having a greater potential for overreaching of clients than a fixed-fee contract, are closely scrutinized by the courts where there is a question as to their reasonableness. This close scrutiny arises from the duty of the courts to guard against the collection of a clearly excessive fee, thereby fulfilling the primary purpose of attorney-disciplinary proceedings, specifically, protecting the public and maintaining the integrity of the legal profession.

177 W. Va. at 363, 352 S.E.2d at 114 (citations omitted).[6] In syllabus point three of *Tatterson*, this Court held that "[i]n the absence of any real risk, an attorney's purportedly contingent fee which is grossly disproportionate to the amount of work required is a 'clearly excessive fee' within the meaning of [Rule 1.5(a) of the Rules of Professional Conduct]." 177 W. Va. at 357, 352 S.E.2d at 108. In syllabus point two of *Tatterson*, this Court further held:

> If an attorney's fee is grossly disproportionate to the services rendered and is charged to a client who lacks full information about all of the relevant circumstances, the fee is "clearly excessive" within the meaning of [Rule 1.5 of the Rules of Professional Conduct], even though the client has consented to such fee. The burden of proof is upon the attorney to show the reasonableness and fairness of the contract for the attorney's fee.

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[6]In *Kopelman and Assocs., L.C. v. Collins*, 196 W.Va. 489, 473 S.E.2d 910 (1996), this Court observed that "courts in West Virginia will uphold contingency fee arrangements voluntarily entered into by the parties as long as they are not excessive, overreaching, and do not take inequitable advantage of a client." *Id*. at 496 n.7, 473 S.E.2d at 917 n. 7. In determining whether a contingent fee contract is reasonable or excessive, this Court has applied the following analysis:

> The reasonableness of attorney's fees is generally based on broader factors such as: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Syl. Pt. 4, in part, *Aetna Casualty & Surety Co. v. Pitrolo*, 176 W.Va. 190, 342 S.E.2d 156 (1986).

Id. at 377, 352 S.E.2d at 108.

In the case sub judice, the Board contends that this Court's decision in *Tatterson* supports its position that Ms. Morton obtained an excessive fee and that her fee was grossly disproportionate to the services she rendered. In *Tatterson*, however, the attorney had entered into a contingency fee agreement with an elderly blind woman in a matter concerning the recovery of life insurance proceeds for the suicide death of the woman's son. The amount of the life insurance proceeds was $61,000. After the insurance company paid the full amount of the insurance proceeds, the attorney deducted his contingency fee of thirty-three percent. An ethics complaint was subsequently filed against the attorney, charging him with obtaining an excessive fee, misrepresenting the degree of difficulty in obtaining the life insurance proceeds, and engaging in unethical conduct while a disciplinary proceeding was pending against him.

This Court determined in *Tatterson* that the evidence supported the charges against the attorney, observing that the attorney did nothing more than assist the woman in filling out forms to obtain the insurance proceeds. We addressed the matter as follows:

> Courts generally have insisted that a contingent fee be truly contingent. The typically elevated contingent fee reflecting the risk to the attorney of receiving no fee will usually be permitted only if the representation indeed involves a significant degree of risk. The clearest case where there would be an absence of real

> risk would be a case in which an attorney attempts to collect from a client a supposedly contingent fee for obtaining insurance proceeds for a client when there is no indication that the insurer will resist the claim.

Tatterson, 177 W.Va. at 363, 352 S.E.2d at 113-14.

Similarly, this Court has reasoned that "a contingent fee is clearly excessive if the skill and labor required of the lawyer are grossly disproportionate to the fee." *Committee on Legal Ethics v. Gallaher*, 180 W.Va. 332, 335, 376 S.E.2d 346, 349 (1988) (citations omitted). In *Gallaher*, a lawyer disciplinary proceeding was brought against an attorney who allegedly obtained an excessive fee from a client. The attorney's client was an elderly woman who sustained injuries while a passenger in a car that was involved in an accident. The woman sustained medical bills in excess of $2,300. The insurance company offered the woman only $726.65. The offer was rejected, and the woman retained counsel *solely* for the purpose of recovering medical payments. The attorney was able to settle the case for $4,500. The attorney charged a fee of fifty percent of the settlement and, therefore, retained $2,250. Lawyer disciplinary proceedings were brought against the attorney as a result of the alleged excessiveness of the fee, and this Court concluded that a fee of fifty percent was indeed excessive and grossly disproportionate to the services rendered. Consequently, this Court reprimanded the attorney and ordered the attorney to return $750 to the client. Even in those circumstances, this Court approved, in effect, a contingent fee of $1,500, constituting thirty-three and one-third percent of the total recovery.

We are not persuaded that this Court's prior decisions support the proposition that Ms. Morton charged an excessive fee and that the fee was grossly disproportionate to the services rendered. In contrast to the actions of the attorneys in *Tatterson* and *Gallaher*, Ms. Morton was actively engaged in representing her client in all aspects of his potential claims for compensation arising from his collision on October 26, 1995, only one aspect of which was the recovery of medical payments under the State Farm insurance policy.

We are similarly unpersuaded by opinions from other jurisdictions cited by the Board in support of its position. In *In the Matter of Hausen*, 488 N.Y.S.2d 742 (1985), the excessive fee was obtained after the attorney received a contingent fee for assisting a client in the recovery of no-fault insurance medical payments, despite an express statutory preclusion of such a fee arrangement. *Hausen,* therefore, does not provide an analogous situation, since the case sub judice does not involve a contingency arrangement expressly precluded by statute. Similarly, we are unpersuaded by *Attorney Grievance Commission v. Kemp*, 496 A.2d 672 (Md. 1985), cited by the Board. In that case, the attorney had obtained a contingent fee from medical payments recovered for the client. The court in *Kemp* appears to have adopted a per se rule that prohibits attorneys from receiving a contingent fee for medical payments recovered on behalf of a client. The court explained as follows: "Petitioner essentially argues that because the services required in filling out a routine, undisputed Med. Pay claim are perfunctory in nature, contingent fees represent an improper measure of professional compensation. We agree." 496 A.2d at 677-78. This Court has not adopted such a rule, and,

in fact, we have tacitly approved such arrangements. *See Bass v. Coltelli-Rose*, 207 W.Va. 730, 536 S.E.2d 494 (2000) (reversing summary judgment for client on issue of whether the attorney/client contract permitted recovery of a contingent fee contingent fees from recovery of medical payments). Thus, while *Bass* presented an opportunity for this Court to prohibit contingency fee agreements that included medical payments and address the issue of whether such fees were reasonable and ethical, this Court declined to do so.

The contractual language memorializing the attorney/client relationship in this case, as quoted above, is not ambiguous. The scope of the agreement is clear in providing for full legal representation to recover "of all monies and things of any value" from anyone Ms. Morton deemed "desirable or necessary" to pursue. This language did not limit Ms. Morton's role to recovering medical payments for Mr. Willis, and the contract did not preclude Ms. Morton from acting on behalf of Mr. Willis in obtaining medical payments. Ms. Morton contracted to provide legal services that empowered her to pursue every source of and right to recovery to which Mr. Willis may have been entitled, as it pertained to his alleged tortious injury.

In her legal representation in this case, Ms. Morton has itemized approximately forty hours of work performed on behalf of Mr. Willis prior to the termination of the legal representation. As compensation for forty hours of work, Ms. Morton obtained $1,500 as a

contingent fee. This translates to roughly $37.50 for each hour of work performed by Ms. Morton. We fail to see how this fee could be characterized as excessive.

IV. Conclusion

Having examined the language of the agreement between the attorney and client to ascertain the scope of the work to be performed by the attorney, and having evaluated the attorney's explanation of all work performed that may fairly be said to have arisen from the agreement, we find that the fee received by Ms. Morton was not grossly disproportionate to the services rendered and was not excessive. This Court believes that in matters involving professional compensation it is incumbent upon the Lawyer Disciplinary Board to fairly examine all of the relevant circumstances of a lawyer's engagement and the professional services in fact rendered when considering whether compensation is excessive, and that focusing on a single component of that compensation without consideration of the entire engagement and services rendered may lead, as it has here, to an unjust conclusion of impropriety.

Based upon the foregoing, this Court concludes that the evidence was insufficient to support the Board's contention that Ms. Morton violated Rule 1.5(a)(1) of the Rules of Professional Conduct. Consequently, this Court hereby orders that the charge against Ms. Morton be dismissed.

Charge dismissed.