

Grievance Administrator,

Petitioner/Appellant,

v

Julian Levant, P 16592

Respondent/Appellee.

94-200-GA

Decided: January 18, 1996

BOARD OPINION

The Grievance Administrator petitioned for review of the hearing panel's decision to suspend the respondent's license for thirty days. The panel found that the respondent neglected a legal matter entrusted to him, failed to properly assert his client's position, failed to appear at a hearing on his client's case, failed to meet his obligations as a fiduciary by failing to maintain his client's funds in his trust account, and failed to provide truthful answers to the Attorney Grievance Commission during its investigation. The Attorney Discipline Board has considered the nature of the respondent's misconduct in light of all of the aggravating and mitigating factors and concludes that a suspension of thirty days is insufficient. Discipline in this case is increased to a suspension of two years.

The respondent has not appealed the hearing panel's findings and conclusions and accepts the statement of proceedings set forth in the Grievance Administrator's brief on appeal, arguing only that it is argumentative and lacks objectivity. Respondent admitted many of the allegations in the complaint during the proceedings before the panel. The respondent was retained in May 1989 to defend a client in a land contract forfeiture proceeding and he filed an appearance in that litigation. The respondent admitted that he failed to file an answer to the summons and complaint and failed to

appear at the December 11, 1989 hearing for entry of a default judgment. Although that judgment was subsequently set aside, the respondent still failed to file an answer and another default was entered. The respondent failed to appear for a hearing. in the matter in January 1990 and a final default judgment was entered against the respondent's client on June 25, 1990 after the respondent failed to appear for the hearing.

During the litigation, the respondent was entrusted with five checks from his client in the total amount of \$1517.80, representing monthly payments for the subject property. The funds were deposited into the respondent's trust account and he acknowledged at the hearing that these were funds to be held solely for the benefit of the client.

The order entered on June 25, 1990 in the land contract forfeiture matter directed that "counsel for defendant shall turn over to counsel for plaintiff all escrowed monies deposited into the escrow account". Although respondent had knowledge of the order, he failed to release Ms. Harville's funds to opposing counsel. The bank records admitted into evidence established that within three months of the deposit of the five checks, the respondent's trust account balance had fallen to \$657.62. The balance dropped to \$455.54 the following month.

On February 12, 1991, the client filed a Request for Investigation with the Attorney Grievance Commission. The respondent's answer filed in April 1991 stated:

I have no idea what Ms. Harville is referring to relating to the \$1517.80 in 'escrow payment'. The only checks received from Ms. Harville were for fees or costs.

At the hearing, the respondent admitted having made this statement but, in direct conflict with his earlier testimony that the funds were to be held in escrow, told the panel that he thought the funds represented attorney fees and costs.

In its report filed July 6, 1995, the panel concluded:

With respect to Count I, the hearing panel concluded that Mr. Levant did neglect the

legal matter entrusted to him by failing to represent his client's position before Mr. Stout, failing to assert his client's position on credits she may have been entitled to, failure to appear and notify his client of the June 25, 1990 hearing in violation of the Michigan Rules of Professional Conduct 1.1(c), 1.3, and 1.4.

On Count II the panel finds Mr. Levant is in violation of the Michigan Rules of Professional Conduct 1.15(a-c) and MCR 9.104(1-4). His trust account balance fell below the amount of \$1,517.00 with no satisfactory explanation. The panel notes that an attorney is personally responsible for the fiduciary duties owed to a client even though the improper handling of client funds may be the result of negligent acts or omissions of employees.

On Count III and IV the panel finds respondent violated Michigan rules of Professional Conduct 8.1(a) and (b), and MCR 9.113(a) and 9.103(c). Respondent had a responsibility to check the file prior to answering the request for investigation and had the responsibility to cooperate with Mr. Turkalay (sic). The panel was troubled by the lack of explanation of the discrepancy between the certified court order of June 25, 1990 and the respondent's copy of the order produced by respondent at the instant hearing. The panel was further concerned with respondent's lack of candor relative to whether or not he appeared at the court hearing on June 25, 1990 that resulted in a Judgment against respondent's client.

In reaching its decision to impose a suspension of thirty days, the panel reported:

Shelby Harville and the respondent testified at the hearing on discipline. Respondent has one prior order of reprimand and a 1988 admonishment. The panel considered the fact that respondent has practiced law since 1970 with no record of discipline other than as stated above, and that the prior reprimand stems from the same time period of 1988 and 1989 as the instant matter. The panel also took into consideration that the respondent's father became ill in 1988 and died in 1991.

This was also the time when respondent's professional corporation went into bankruptcy. The hearing panel also considered the cumulative effect of a finding of misconduct on four counts. Of most trouble was the panel's conclusion that respondent was not candid in accepting responsibility for a lack of funds in his trust account, and testifying he was present at the hearing on June 25, 1990 and later changing his testimony.

While the Board must determine whether a hearing panel's factual findings have proper evidentiary support, the Board possesses a somewhat greater measure of discretion with regard to the appropriate sanction to be imposed. In re Daggs, 411 Mich 304, 318-319 (1981); Grievance Administrator v August, 438 Mich 296, 304; 475 NW2d 256 (1991). Cases involving the discipline of attorneys are necessarily fact sensitive and, with regard to the appropriate level of discipline to be imposed, are difficult to compare beyond a superficial extent. See Matter of Grimes, 414 Mich 483; 326 NW2d 380, (1981).

In this case, the assessment of discipline should not be confined to the respondent's neglect of a legal matter, his improper handling of his client's funds and the those inaccuracies in answers to the Grievance Commission which could, arguably, have been the result of carelessness.

The record in this case, including the respondent's contradictory testimony to the hearing panel, is so replete with inconsistencies and inaccuracies that we must assign appropriate weight to the cumulative effect of respondent's untruthfulness.

Like the panel, we are troubled by the discrepancy between the certified copy of the court order time stamped June 27, 1990 and the copy of that order produced by the respondent in answer to the Request for Investigation.

We have carefully considered the argument presented by the respondent and his counsel at the review hearing that opposing counsel in that land contract forfeiture case handed a copy of the order to the respondent for signature, but that opposing counsel

subsequently presented two versions of the order to the court clerk for entry. According to the respondent, it was the signed copy handed to him by opposing counsel on June 27, 1990 which he retained in his file and which he forwarded to the Attorney Grievance Commission in the belief that it was consistent with the order actually entered. Respondent was unable to explain, however, how his copy, handed to him by opposing counsel before presentation to the court clerk could bear the court's time stamp dated June 27, 1990 and, more significantly, how it could bear the signature of a deputy clerk certifying the judgment was mailed to the plaintiff and defendant on July 9, 1990. In short, the Respondent's explanation defies logic.

The American Bar Association's Standards for Imposing Lawyer Sanctions (Approved February 1986, ABA House of Delegates) identifies the submission of false evidence, false statement, or other deceptive practices during the discipline process as a factor which may justify an increase in the degree of discipline to be imposed after misconduct has been established. ABA Standards for Imposing Lawyer Sanctions, Standard 9.22(f). The Board has also recognized lack of candor during the disciplinary process as an appropriate factor to be considered in aggravation. "In fact, we can conceive of few factors deserving of greater weight in aggravation than a finding that an attorney has given false testimony during disciplinary proceedings." Grievance Administrator v Richard Meden, 92-106-GA, Brd. Opn. (7/30/93).

In this case, review of the misconduct admitted and found by the panel, the aggravating effect of the Respondent's inconsistent and misleading statements during the course of these proceedings and the extent to which the respondent's actions reflect upon his basic character leads to our conclusion that discipline was be increased to a suspension of two years.

Board Members C. Beth DunCombe, Marie Farrell-Donaldson, Elaine Fieldman, Barbara Gattorn, Albert L. Holtz, Miles A. Hurwitz and Paul D. Newman concur.

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Board Member Michael R. Kramer would increase discipline to a suspension of one year.

Board Member George E. Bushnell, Jr. did not participate.