Grievance Administrator,
Petitioner/Appellant,
v
William F. Klintworth, P-30993,
Respondent/Appellee.

ADB 104-88; 210-88

Decided: August 18, 1989

BOARD OPINION

The Attorney Discipline Board has considered the Petition for Review filed by the Grievance Administrator seeking reversal of the hearing panel's dismissal of two counts of the formal complaint and requesting an increase in discipline. We conclude that the hearing panel erred in dismissing Counts I and II of Formal Complaint ADB 104-88. However, we affirm the hearing panel's conclusion that a reprimand is appropriate under the facts and circumstances in this case.

Based upon the evidence presented in support of the allegations in Counts I and II of Formal Complaint ADB 104-88, the hearing panel made the following findings of fact:

> "In 1987, the Respondent represented Lillian E. Ashley in a bankruptcy matter (Eastern District Northern Division, File #83-00624). On or about April 2, 1987, Bankruptcy Trustee, Randall Frank, issued a check payable to Lillian Ashley in the amount of $5,000, representing monies exempt from the bankruptcy proceedings. Both the Respondent and Mrs. Ashley endorsed this check, and the Respondent deposited this check in his trust account on April 10, 1987. Although Mrs. Ashley's share of this money was supposed to be $3,000, when the Respondent gave her a check for this amount, it bounced, and the Respondent was required to put other monies into the account to cover the check.
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> In 1987, the Respondent represented Oscar Hoffman, Jr., in an insurance claim concerning the death of his father. On May 18, 1987, State Farm Insurance Company issued a settlement check in this matter for $20,000. Both Mr. Hoffman and the Respondent endorsed this check, and the Respondent deposited it into his trust account on June 1, 1987. Mr. Hoffman's share of this money was supposed to be $12,909.07, but when the Respondent issued Mr. Hoffman a check for this amount on July 1, 1987, such check was returned for non-

> sufficient funds, and the Respondent had to pay additional money into this account to make the check good."

In its conclusions, the hearing panel reported that as to both counts, it found "no actionable violation of any rule."

Based upon the evidence presented, a finding that respondent failed to make timely delivery of the client funds in his possession and that he misappropriated funds was warranted. The panel's factual findings support a conclusion that the respondent violated the provisions of Canon 1, DR 1-102(A)(6) and Canon 9, DR 9-102(A)and(B)(4).

The allegations here are similar to those made in Matter of William W. Swor, ADB 118-87, Board Opinion March 16, 1989. In that case, respondent settled a case for a client for a total of $500 and he admitted that, after deduction of his fee, the amount of $366 should have been maintained in his trust account for his client. He testified that the file was closed and that somehow he forgot about the case until he was contacted by the client two years later. The bank records offered into evidence established that the balance in the trust account had fallen below the required amount. In its opinion in that case, the Board reaffirmed its adoption of a definition of misappropriation employed by the District of Columbia Court of Appeals:

> "Misappropriation of client funds is any unauthorized use of clients' funds entrusted to an attorney including not only stealing, but also unauthorized temporary use for the lawyer's own purpose . . . it is essentially a per se offense. Consequently, once the running balance of Harrison's office account fell below the amount held in trust for Hart, misappropriation had occurred." In re E. David Harrison, 461 A2d 1034 (1983).

This definition is consistent with earlier rulings of the Board including Matter of Barry R. Glaser, DP 106/84, September 30, 1985 (Brd. Opn. p. 379). "The repeated depletions of the professional account which was used to hold client funds constituted, at the very least, prima facie misconduct."

In Matter of William Swor, supra, the Board vacated the dismissal of the count charging misappropriation and imposed a reprimand based upon mitigating factors which included the respondent's prior unblemished record, his restitution to his client and the negligent, rather than intentional, nature of his act. Similar mitigation has been present in this case. The hearing panel also gave weight to the mitigating effect of the severe stress in respondent's life caused by problems with his new-born baby, responsibilities for his aging mother and substantial efforts to correct the administrative deficiencies in his office.

As in Swor, we conclude that a reprimand is warranted for the misconduct established in Counts I and II of ADB 104-88.

The Board has also considered the Grievance Administrator's argument that the discipline imposed by the hearing panel was insufficient in light of the other acts of misconduct found to have been committed. While we cannot condone the respondent's conduct and are especially troubled by the respondent's misconduct in the Joyce Lardie matter (Complaint ADB 210-88, Count I), we are unable to conclude that the discipline imposed by the panel was clearly inappropriate or that the Board should substitute its judgment for that of the hearing panel which had the better opportunity to observe and evaluate the respondent during the trial.

Finally, we must address the hearing panel's finding that the respondent's conduct as alleged in ADB 210-88, Count III, (Matter of Paula Selkirk) constituted the charging or collection of a clearly excessive fee in violation of Canon 2 of the Code of Professional Responsibility, DR 2-106(A). As pointed out by the Grievance Administrator, the excessive fee violation under Canon 2 was not charged in the complaint. It is a fundamental precept that the respondent in disciplinary proceedings must be given proper notice of the disciplinary charges which he or she is required to defend. An attorney may not be disciplined for misconduct not charged in the complaint. See In re Ruffalo, 390 US 544; 88 S Ct 1222; 220 L Ed 2d 117 (1968); State Bar Grievance Administrator v Jackson, 390 Mich 147; 211 NW2d 38 (1973). The finding that respondent violated DR 2-106(A) is therefore stricken. Nevertheless, the panel's findings of fact clearly support charges which were set forth in the complaint and we find that conduct to be in violation of MCR 9.104(2); MCR 9.104(3); and Canon 1, DR 1-102(A)(6).

All concur.