STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,
State of Michigan
Attorney Grievance Commission,

Petitioner/Appellant,

v

Patrick M. Tucker, P 37256,

Respondent/Cross-Appellant.

Case No. 91-60-GA; 91-104-FA; 91-180-GA

Decided: December 18, 1992

BOARD OPINION
Majority

The Grievance Administrator and the respondent have each filed petitions for review seeking modification of a hearing panel order suspending the respondent's license to practice law in Michigan for one year. Upon careful consideration of the whole record, we agree with the hearing panel's assessment of the compelling mitigating factors which warrant a suspension of one year. At the same time, these factors raise concerns regarding the extent of the respondent's continuing recovery and the future protection of the courts and the public. The order of discipline will be modified by imposing additional conditions requiring supervision of the respondent during the period of his suspension and for an additional period of time in the event he is reinstated.

The hearing panel found that the allegations of misconduct contained in Formal Complaint 91-60-GA, Count I-(G)(ii); Formal Complaint 91-104-FA; and Formal Complaint 91-180-GA, Count I-(H)(i),(iii) and (iv), Count V and Count VI were established by a preponderance of the evidence.

The respondent was given a power of attorney to sell real property belonging to a client. He received proceeds from the sale in the amount of $15,000 in the form of a check which he deposited in his client trust account. The panel found that the respondent misappropriated net proceeds of $5082-31 which should have been remitted to the clients.

In a separate matter, the respondent received a check in the amount of $23,630-26 made payable to a decedent's estate. As attorney for the personal representative, the respondent deposited that check into his client trust account. The panel found that the respondent commingled the estate funds with his own; misappropriated estate funds of $16,463.23; and issued a check to the beneficiary of the estate in the amount of $11,238-88 which was dishonored for insufficient funds.

In addition to these acts of misconduct, the respondent failed to file a timely answer to a Request for Investigation; failed to produce material requested by the Attorney Grievance Commission; failed to appear pursuant to the Commission's investigative subpoena; and failed to file a timely answer to a formal complaint.

The respondent's conduct was found to be in violation of MCR 9.104(1-4,7), Michigan Rules of Professional Conduct Rule 1.15(a,b) and 8.1(b); and 8.4(a,c) and provisions of Canons 1 and 9 of the then applicable Code of Professional Responsibility, DR 1-102(A)(1,3-6)and DR 9-102(A),(B)(4).

With regard to the charges of commingling and misappropriation of client funds, those charges were either uncontested by the respondent or, in the case of complaint 91-60-GA, were described by the respondent as "misapplication" of funds which resulted from the disarray of his trust account records rather than intentional misappropriation. In answering the charges based upon his failure to respond to the Grievance Commission's investigation, the respondent cited his "paralyzing apprehension". During the course of the proceedings, this explanation was further raised in connection with the respondent's affirmative defense that his ability to practice law competently during the time the misconduct occurred was materially impaired by an alcohol addiction which substantially contributed to his misconduct.

The respondent admitted to the panel that he is an alcoholic. He testified that his heavy drinking in college resulted in a drinking problem which became progressively worse from approximately 1983 until the summer of 1991. In early September 1991, the respondent was admitted as a patient at the Chemical Dependency Unit of Miller-Dawn Hospital in Duluth, MN. The respondent received inpatient treatment there for twenty-eight days, followed by an after-care program involving regular attendance at Alcoholics Anonymous meetings approximately four times per week.

At a separate hearing on discipline, evidence pertaining to the respondent's history of alcoholism, its increasing effects on his ability to discharge his private and public obligations as an attorney and prosecutor, his hospitalization and his apparent recovery was offered in the form of testimony from the respondent's inpatient counselor at Miller-Dwan, the respondent's substance abuse counselor from Lutheran Social Services, the Honorable Garfield Hood of the 12th Circuit Court, the Honorable Anders Tingstad of the 98th District Court and the Ontonogan County Sheriff.

The respondent's request for an order of probation under the provisions of MCR 9-121(C) was denied by the hearing panel. The panel concluded that while the respondent was affected by his abuse of alcohol, and that his condition subsequently deteriorated to the point of incompetence, the respondent was competent to practice law at the time the acts of commingling and misappropriation occurred and that the respondent had therefore failed to meet the requirement of MCR 9.121(C)(1)(a) that his

ability to practice law competently was materially impaired during the period when the misconduct occurred. We believe that the panel's ruling has evidentiary support. We note also that even if a respondent has met each of the four criteria of MCR 9.121(C)(1), the decision to impose probation is discretionary and requires a further affirmative finding by the panel, the Board or the Supreme Court that an order of probation would not be contrary to the public interest. In this case, suspension, rather than probation is an appropriate sanction.

The respondent's commingling and misappropriation of client funds was inexcusable and reprehensible. Absent mitigation, respondent's offenses would likely result in revocation of his license to practice law. Matter of Muir B. Snow, DP 211/84, Brd. Opn. 2/17/87. Moreover, in rejecting the respondent's request for a decrease in the suspension imposed, we reject any suggestion that the respondent's service as the prosecutor of Ontonogan County constitutes significant mitigation. The fact that acts of professional misconduct were committed while the respondent held a position of public trust should, in our view, be considered as an aggravating circumstance.

The Petitioner/Grievance Administrator argues that the panel rejected the respondent's "purported alcoholism" as mitigation, at least as to the misappropriation charges, and it is asserted that there was generally a lack of mitigating evidence. We do not agree.

The evidence of the respondent's alcoholism and its effects on the respondent's personal and professional life was substantial and was essentially unrebutted. While the hearing panel did not find that the respondent's dependence on alcohol warranted the imposition of probation, the panel referred to the testimony of his inpatient counselor and his current substance abuse counselor. Both testified that the respondent's alcohol abuse was a substantial contributing factor to his misconduct. This testimony, together with the evidence of the respondent's continued rehabilitation, full restitution and the responsibility which he has taken for his own actions was cited by the panel as evidence of compelling mitigation warranting discipline less severe than might otherwise have been imposed.

The Supreme Court has suggested in earlier decisions that discipline should not be imposed without consideration of the facts in each case.

> "In reviewing the discipline imposed in a given case, we are mindful of the sanctions meted out in similar cases, but recognize that analogies are not of great value.
>
> 'As a hypothetical proposition, we find dubious the notion that judicial or attorney misconduct cases are comparable beyond a limited and superficial extent. Cases of this type generally must stand on their own facts'. State Bar Grievance Administrator v DelRio, 407 Mich 336, 350; 258 NW2d 277 (1979)

> Our task then is to make certain that within each case there is proper evidentiary support for the findings of the hearing panel and the Attorney Discipline Board." Matter of Grimes, 414 Mich 483; 326 NW2d 380, 382 (1982)

The hearing panel's finding of compelling mitigation clearly has evidentiary support in the record below. We are satisfied that the hearing panel carefully considered these factors in arriving at its decision to impose a suspension of one year. That suspension will not, of course, be terminated automatically at the end of one year. It will require that the respondent file a petition for reinstatement, followed by a hearing before a panel at which it will be the respondent's obligation to establish his eligibility for reinstatement by clear and convincing evidence.

We believe, however, that protection of the public, the courts and the legal profession can be further achieved by imposing additional conditions, as allowed by MCR 9.106(2), requiring that the respondent's continued recovery be monitored, with periodic reports to the Attorney Discipline Board and the Attorney-Grievance Commission. In the event that the respondent successfully establishes his eligibility for reinstatement, the respondent's progress will be monitored for an additional period of one year.

John F. Burns, George E. Bushnell, Jr., C. Beth DunCombe, Elaine Fieldman, Linda S. Hotchkiss, M.D., and Theodore P. Zegouras

DISSENTING OPINION

Miles A. Hurwitz

It is not seriously disputed that the respondent committed serious acts of misconduct, including the misappropriation of client funds in 1987 and 1988 nor that the respondent was abusing alcohol at about that time.

Both parties have appealed the hearing panel's decision to impose a suspension of one year. A decision to affirm the one-year suspension would be based primarily upon a policy of giving deference to a panel's decision where possible and where the discipline imposed by the panel falls within the general range of discipline imposed for that type of misconduct.

However, while the Board reviews a panel's factual findings for adequate evidentiary support, the Supreme Court has recognized that the Board also possesses "a measure of discretion with regard to its ultimate decision". Grievance Administrator v August, 438 Mich 296; 475 NW2d 256 (1991). With regard to the level of discipline to be imposed, the Board should take advantage of its broader overview to achieve a certain consistency among panel decisions.

Attorneys who have misappropriated client funds have received discipline ranging from reprimand or probation to revocation. The term

"misappropriation" itself can include an inadvertent shortfall in a client trust account (see, for example, Matter of Robert R. Cummins, ADB 159-88, Brd. Opn. 12/5/88). That term can also include an intentional misuse of client funds. This case appears to fall in the latter category.

In general, it can be said that cases involving intentional misappropriation of client funds have resulted in discipline ranging from a three-year suspension to disbarment. The Board's opinion in Matter of Muir B. Snow, DP 211/84, Brd. Opn. 2/17/87 is instructive. Respondent Snow testified to the hearing panel that his income decreased during a period of heavy drinking and that he used estate funds entrusted to his care to discharge his own personal obligations. In an opinion increasing the suspension from two years to three years, the Board suggested that disbarment would have been appropriate but for the mitigating effect of the respondent's continued recovery from alcoholism. Three year suspensions for misuse of client funds were also imposed in Matter of Edwin Fabre', DP 84/85; DP 1/86, Brd. Opn. 9/30/86 (increasing suspension from sixty days to three years); Matter of John D. Hasty, ADB 1-87, Brd. Opn. 2/8/88 (affirming a three-year suspension); Matter of Kenneth E. Scott, DP 178/85, Brd. Opn. 2/8/88 (suspension of 180 days increased to three years).

However, with the exception of the Matter of Edwin Fabre', the cases cited above were not unanimous opinions and were accompanied by strongly-worded dissenting opinions expressing the view that disbarment is generally appropriate in cases involving the intentional misuses of client funds. In his dissenting opinion in Matter of Muir B. Snow, supra, former Board chairperson Hanley Gurwin noted that without documented medical evidence that the respondent's alcohol abuse influenced his judgment, the respondent should be held culpable for the misappropriation of thousands of dollars. We should be mindful of the seriousness of the duties of a fiduciary.

Alcohol abuse is not necessarily exculpatory or mitigatory in cases involving the theft of client funds. A substantial nexus between the substance abuse and the misconduct should be shown before the Board, in its discretion, lessens the sanction for what is widely considered to be one of the most serious offenses which can be committed by a lawyer.

The rationale behind a general rule calling for disbarment in such cases was further discussed in a dissenting opinion in Matter of John D. Hasty, supra, by former Board members Gurwin and Martin M. Doctoroff. They noted that in a 1976 opinion, the Michigan Supreme Court agreed with the former State Bar Grievance Board that suspension was inappropriate where an attorney commingled funds and converted the proceeds of estates while acting as a fiduciary. The Court adopted the Grievance Board's unanimous conclusion that:

> "There are few business relations involving a higher trust and confidence than that of an attorney acting as trustee in the handling of money for his client or by order of the court. The basis of this relationship is

> one of confidence and trust. Any action by the attorney which destroys that basic confidence and trust clearly subjects the legal profession and the courts to obloquy, contempt, censure and reproach. Foremost among the acts destroying the confidence between the public and the Bar is the conversion or misuse of a client's funds and the failure or refusal of an attorney to obey the orders of the court." In the Matter of Leonard A. Baun, 396 Mich 421; 240 NW2d 729 (1976)

I see no change in circumstances since that view was affirmed by our state's highest court. It is still true that ordinary citizens who would not consider depositing their money in an institution which is not insured by an agency of the federal government are willing to entrust those funds to a lawyer. In most cases, the client does not demand that the lawyer provide proof of insurance or demand an audit of the lawyer's trust account. The lawyer who betrays that trust does irreparable harm to the public confidence in the legal profession.

In an opinion often cited in such cases, the Supreme Court of New Jersey observed that banks do not rehire tellers who have embezzled funds and that the standards of the legal profession should be at least as high. Matter of Wendell B. Wilson, 81 NJ 451; 409 AT2d 1153 (1979). 1 believe that observation is still relevant.

Would any of us, as depositors at a bank or savings institution, accept a statement from a bank president that the bank was willing to rehire admitted embezzlers as long as they had shown remorse? Could a bank justify the continued employment of an embezzler on the grounds that the stolen funds had been replaced?

I believe that remorse, a prior unblemished record, restitution or recovery from substance abuse should be given relatively little consideration as mitigating factors when a lawyer has stolen from his or her clients. The reasons behind this view were stated by the court in Wilson, supra:

> "Maintenance of public confidence in this court and in the bar as a whole requires the strictest discipline in misappropriation cases. That confidence is so important that mitigating factors will rarely override the requirement of disbarment. If public confidence is destroyed, the bench and bar will be crippled institutions." Wilson, supra. 81 NJ at 461.

I dissent from the opinion of the Board and would increase discipline in this case to revocation. Lawyers who steal from their clients should be disbarred.