GRIEVANCE ADMINISTRATOR,
Petitioner/Appellant,
v
ALLEN N. DAVEY, P-27194,
Respondent/Appellee.

Case Nos. ADB 27-88; 44-88

Decided: December 6, 1988

BOARD OPINION

The Grievance Administrator has filed a petition seeking review of a hearing panel order suspending the respondent's license to practice law for a period of six months. The hearing panel specifically found that funds entrusted to the respondent as a fiduciary were removed from the State of Michigan without notice and were commingled in the respondent's personal checking account. The panel further ruled that the balance in the account fell below the amount held in trust resulting in a situation described as a "technical misappropriation". The panel's order is modified by increasing discipline in this case to a suspension of two years.

The Grievance Administrator filed a complaint on February 17, 1988 which charged in Count I that the respondent failed to preserve the identity of funds to be held in trust and misappropriate those funds. It was further charged in Count II of the complaint that he attempted to release those funds by delivering a personal check which was dishonored for the reason that there were insufficient funds in his account. It was alleged that the respondent knew or should have known that there were insufficient funds in his account when he delivered the check. Although the respondent filed an answer with the Attorney Discipline Board on March 18, 1988, a default was filed by the Grievance Administrator on March 20, 1988 along with a new complaint, ADB 44-88 charging that the failure to answer the first complaint was an act of professional misconduct.

The respondent did not appear at the hearing in Southfield, Michigan on April 6, 1988 as required by MCR 9.115(H). At all times during these proceedings, the respondent has maintained as his address a post office box in the State of Hawaii. At the commencement of the hearing, the panel ruled, sua sponte, that the default filed by the Grievance Administrator should be set aside for the reason that the respondent had filed a timely answer which was accompanied by a proof of service showing delivery to the panel members and the Grievance Administrator but that the copy addressed to the office of the Grievance Administrator was sent to the wrong address. Notwithstanding the respondent's failure to appear at the hearing, the panel set aside the default. The Grievance Administrator argues that this was error.

We believe that the panel acted correctly in rejecting the argument presented on behalf of the Grievance Administrator that

failure to appear at a hearing must necessarily result in the respondent's default. The duty to answer a formal complaint as set forth in MCR 9.115(D)(1) and the consequence of a failure to answer is described in the following sub-rule which states that a "default, with the same effect as a default in a civil action" may enter against a respondent who fails to answer within the time permitted. MCR 9.115(D)(2). The respondent's duty to personally appear at the hearing for cross-examination, on the other hand, is set forth in MCR 9.115(H). That rule does not declare an absent respondent to be in default but does allow the panel to enter an interim suspension in the case of a respondent who fails to appear by reason of a claimed physical or mental incapacity.

It appears that the court rules would allow a hearing panel to set aside a default, even if the respondent were absent, provided a proper motion to set aside default was filed, accompanied by the necessary affidavit of facts showing a meritorious defense. Unfortunately, the record is unsatisfactory with regard to whether or not such a motion was filed in this case. The transcript of the proceedings contains references by the panel chairman to a motion to set aside the default. Although such a motion may have been mailed by the respondent to the panel members, it was not filed with the Attorney Discipline Board as required by MCR 9.115(A) and we are unable to address the sufficiency of that motion.

Inasmuch as the answer eventually received by the panel admits most, if not all of the factual allegations in the complaint, a further ruling by the Board on the panel's decision to set aside the default is not necessary to resolve the other issues raised in the Grievance Administrator's petition for review. We would state only as a general principle that motions to set aside defaults in these disciplinary proceedings should be decided in accordance with the provision of MCR 2.603. Notwithstanding the Grievance Administrator's objections to the procedure followed by the panel, it appears that the respondent's admissions coupled with the documentary exhibits received into evidence are sufficient to established misconduct and we are able to focus on the more important issue presented in this appeal, that is, the appropriate level of discipline.

In approximately October 1985, the respondent received a check from the Monumental Life Insurance Company in the amount of $10,000 payable jointly to the respondent as attorney for a client and to another attorney representing a second claimant. In March 1986, the other attorney endorsed the check and returned it to the respondent "in trust to you for the purpose of establishing a bank account which bears interests [sic] which shall be held in trust for the benefit of both [clients]". In letters offered into evidence by the Grievance Administrator, the respondent stated that he deposited those funds in his client rust account at a branch of the Michigan National Bank. However, he subsequently left the State of Michigan, taking the funds with him to the State of Hawaii where they were, admittedly, deposited into the respondent's personal checking account. The only explanation which appears in

respondent's letters is that he had no remaining checks for the trust account and could not disburse the funds without first depositing them in his own checking account. When this dispute over the distribution of the funds was resolved, he forwarded his personal check in the amount of $10,000 to opposing counsel. However, he explained to the Attorney Grievance Commission in a letter dated February 12, 1988:

> "After a period of time, my girlfriend wrote a check while shopping, not knowing the correct balance in the account. Upon learning of this, I went to the bank and found the $10,000 check had been returned NSF. At the time there was $9,900 plus in the account. At no time did I misappropriate client funds as the matter was a mistake as to the balance in the account and not an intentional act."

In its report on discipline, the hearing panel referred to its determination that the respondent had "exhibited a serious lack of judgment in failing to properly segregate client trust funds, removing said trust funds from the State of Michigan and failing to appear at the hearing to explain the circumstances involved." The panel went on to state that while it was particularly concerned with the misappropriation of funds, they had considered the mitigating effect of respondent's prompt efforts to replace the dishonored check within seven days. Based upon those considerations, the panel imposed a suspension of six months.

The panel's concern with commingling and misappropriation of funds was well-founded. Because the respondent did not appear personally at the hearing for cross-examination, we are left with a somewhat sparse record which does not address certain unanswered questions. For example, if, as respondent alleges, the funds in question could be wired from a trust account in Michigan to respondent's personal checking account in Hawaii, why could the transfer not have been made by a similar wire transfer directly from the trust account to the other attorney?

As we have noted in other cases, a serious breach of this attorney's duty to safeguard and segregate client funds occurred the moment the funds in question were placed in his personal checking account. By his explanation that the "mistaken" use of a portion of the $10,000 held in trust was the result of a check written by his girlfriend rather than himself, the respondent merely emphasizes the underlying rationale behind the duty to segregate client funds. He acted with a willful disregard for his duties as a fiduciary by allowing his girlfriend to have access to that account. It is quite beyond imagination that the attorney who endorsed the $10,000 over to the respondent for the purpose of establishing a bank account "to be held in trust for the benefit of both clients" could have foreseen that the amount held in trust could be directly affected by the length of the respondent's girlfriend's grocery list.

As noted above, the record in this case contains some unanswered questions and we would frankly have preferred to know more about the circumstances surrounding the respondent's efforts to notify his client and opposing counsel of his decision to leave the State of Michigan and his efforts to inform them of his whereabouts in Hawaii. MCR 9.115(H) specifically requires that a respondent in these disciplinary proceedings personally appear at the hearing for cross-examination as an opposite party. Had the respondent in this case complied with that rule, both the panel and the Board might have been able to make a better assessment of the facts and circumstances surrounding this complaint. Obviously, the respondent's return to the State of Michigan for the hearing in this case would have involved certain expenses and personal inconvenience. We believe, however, that these proceedings are of sufficient importance to warrant such an effort.

Conversely, the respondent who ignores the duty to appear exhibits a disregard for the disciplinary system and his or her obligations under the court rules. Given a further opportunity to appear before the Board to present oral arguments on the issues raised by the Grievance Administrator's petition for review, respondent again declined to attend. Respondent's failure to appear personally at any stage of these proceedings constitutes an important aggravating factor which, when considered with the serious nature of his misconduct, warrants an increase in discipline to a suspension of two years.

Remona A. Green, Robert S. Harrison, Patrick J. Keating, Theodore P. Zegouras.

Dissenting Opinion

Martin M. Doctoroff, Hanley M. Gurwin

We adhere to the general principle that conversion and misappropriation of client funds rank among the most serious offenses an attorney can commit. The Attorney Discipline Board has been consistent in recognizing this principle, at least in an abstract sense. When considering specific situations, the Board has announced that, depending upon several factors, discipline ranging from a suspension from three years to disbarment would be appropriate for such an offense. Matter of John D. Hasty, ADB 1-87, (Brd. Opn. February 8, 1988), citing In the Matter of Douglas E.H. Williams, DP 126/81, March 30, 1984 (Brd. Opn. p. 313). Those factors are generally based upon evidence submitted by the respondent in mitigation, including the respondent's own testimony from which the panel and the Board are able to draw certain conclusions and make assessments regarding the respondent's character. When, as in this case, the respondent fails to appear at any stage of the proceedings despite the serious nature of the misconduct charged, we are not inclined to find that mitigation should be considered or that there should be a reduction in the level of discipline which is generally appropriate for that type of offense. We would increase discipline in this case to a revocation

of the respondent's license to practice law.