GRIEVANCE ADMINISTRATOR,
Petitioner/Appellant,
v
DAVID A. NELSON, P-18227,
Respondent/Appellee.

File No. DP 127/86; DP 165/86

Argued: January 28, 1987
Decided: March 27, 1987

OPINION OF THE BOARD

Following its consideration of Petitions for Review filed by both the Respondent and the Grievance Administrator, the Attorney Discipline Board affirms the findings of the Hearing Panel that misconduct has been established by a preponderance of the evidence and that Respondent violated the provisions of MCR 9.104(1-4) and Canons 1 and 9 of the Code of Professional Responsibility. We conclude, however, that Respondent's improper handling of client funds warrants an increase in the discipline imposed by the Hearing Panel. Discipline is increased from a suspension of ninety (90) days to a suspension of 180 days and until Respondent has established his eligibility for reinstatement in accordance with MCR 9.123(B).

The Report of the Hearing Panel precisely summarizes its findings of fact based upon its evaluation of the testimony and documentary evidence presented. Those proofs established that one April 29, 1983, Respondent received a check in the amount of $9,433.00 naming the Respondent and his client, Jerry Lenhart, joint payees. That check represented a settlement of a claim filed by Respondent on Lenhart's behalf. Upon receipt of the check, Respondent endorsed his own name on the check along with the name of his client and, on May 20, 1983, deposited the check in bank account entitled "David A. Nelson, P. C. Trust Account". The Panel found that Respondent Nelson withdrew the funds from that account on the date the deposit was made. The Panel concluded that Respondent did not notify his client that he had received the settlement check until late July or August of 1983 and did not maintain a sufficient balance in his client account to cover any claim which might have been made against the funds rightfully belonging to Mr. Lenhart. The Hearing Panel imposed a suspension of ninety (90) days, specifically citing the mitigating effect of Respondent's prior unblemished record, his restitution to the Complainant and his performance of substantial legal services for his client.

We consider first the arguments offered in support of the Petition for Review filed by the Respondent, commencing with the claim that the failure of the Hearing Panel to schedule a hearing within fifty-six (56) days of the filing of the Formal complaint constituted a jurisdictional defect warranting dismissal of the action. At the commencement of the hearing panel proceedings, Respondent noted that MCR 9.111(B) directs that a hearing panel shall hold a public hearing on a complaint assigned to it within fifty-six (56) days after the date the Complaint is filed with the Board. The hearing in this matter was commenced fifty-eight (58) days after the filing of the Complaint.

We affirm the Panel's denial of Respondent's Motion to Dismiss. For the reasons stated in the Board's Opinion In the Matter of Schwartz v Ronald R. Kubik, DP 186/84 filed February 2, 1987, we adopt the language which appears in State Bar Grievance Administrator v Posler, 393 Mich 38 (1974) in ruling that the procedures in these disciplinary matters should be as expeditious as possible but that the time requirements of MCR 9.111 "should be regarded as a goal and not jurisdictional". As the Board noted in Kubik, the rule cited by Respondent must be read in conjunction with MCR 9.102(A) which provides that the rules governing these discipline matters are "to be liberally construed for the protection of the public, the courts and the legal profession"; with MCR 9. 107 which directs that "an investigation or proceeding may not be held invalid because of a non-prejudicial irregularity or an error not resulting in a miscarriage of justice"; and with MCR 9.115(G) which suggests the appropriate remedy, i.e. reassignment of the complaint to another panel, if the hearing panel fails to convene its hearing within a reasonable time.

Respondent further urges that the actions of Respondent as proven by a preponderance of the evidence did not constitute violations of MCR 9.104 and Canons 1 and 9 of the Code of Professional Responsibility. As a general rule, the findings of a hearing panel will be supported where "upon the whole record, there is proper evidentiary support. In Re Del Rio, 407 Mich 336; 285 NW2d 277 (1979). The Board has previously stated that:

> The hearing panel receives evidence in the first instance and has the opportunity to judge . . . credibility. The hearing panel's finding of fact should be given deference whenever possible. Schwartz v Walsh, DP 16/83, 1984 (Brd. Opn. p. 33)

Based upon the review of the record and our consideration of the arguments presented by the parties, we have little difficulty in reaching our conclusion that the findings of the Panel are amply supported by the evidence. While we recognize that there were certain irreconcilable differences presented in the testimony of the Respondent and Complainant Lenhart, we decline to disturb the collective judgment of the panel members who had the benefit of an opportunity to observe the presentation and demeanor of the witnesses before them. Moreover, Respondent openly admits to certain conduct which is prohibited by the Code of Professional Responsibility.

In oral arguments to the Board in support of his Petition for Review, for example, Respondent's counsel acknowledged that the settlement check in question was deposited by Respondent Nelson in his trust account and was immediately withdrawn, converted to cash, commingled with funds belonging to another client of Mr. Nelsons and used to discharge a Land Contract payment totally unrelated to Lenhart. (R. Hrg. Tr. p. 13-14, 1/28/87) Although Respondent's counsel went on to argue that this otherwise inexplicable action was taken by Respondent as a matter of "convenience" and that Respondent maintained cash in an equal amount in a safe deposit box, the transaction was, at the very least, a violation of the requirements of Canon 9 of the Code of Professional Responsibility, DR 9-102(A) which directs that all funds of a client paid to a lawyer "shall be deposited in one or more identifiable bank accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein . . ."

As counsel for the Grievance Administrator has pointed out, Respondent has given various accounts during the course of these proceedings concerning the location of the funds which should have been held on his client's behalf from April, 1983 to September, 1983, but he does not argue that those funds were maintained in the only repository authorized by the Code, an identifiable trust account. The provisions of Canon 9 exist for one purpose only -- the protection of the public. It may have been more convenient for Mr. Nelson to use the proceeds from the Lenhart settlement check as part of a payment to a land contract vendor in an unrelated matter. It would undoubtedly be more convenient for all attorneys if they were not required to maintain separate accounts and separate records when they are charged with the responsibility of holding money which belongs to other people.

We categorically reject the argument that an attorney may waive the trust account provisions of Canon 9 by the deposit of the lawyer's own funds in a safe deposit box, personal account, business account, money order or other instrument. Any other ruling by this Board would constitute a declaration that clients may no longer rely upon the trust which has historically reposed in the legal profession as a repository of client funds. We believe that the license to practice law in Michigan should constitute a proclamation that the holder is fit to be entrusted with the money of others simply because that person is a lawyer and not because he or she has cash stored away in a safe deposit box.

Finally, Respondent argues that the misconduct charged in the Formal Complaint would not, in any event, warrant the ninety (90) day suspension imposed by the Panel. His claim is countered by the Grievance Administrator in a Petition for Review requesting an increase in discipline.

The Board acknowledges the mitigating effect of Respondent's unblemished record during his previous eighteen (18) years of practice, his payment of the funds in question to his client prior to the commencement of an investigation by the Grievance Administrator and his performance of substantial legal services for this client in connection with a number of legal matters under circumstances which lend credence to Respondent's claim that he acted at the express or implied-direction of his client. Absent our consideration of such mitigation, the discipline we might impose for Respondent's improper handling of client funds would have been more severe. As noted above, however, we must conclude that Respondent lacks a proper understanding of the standards that are imposed on members of Bar with regard to the handling of client funds. Without such an understanding, we cannot safely recommend this Respondent to the public, the courts and the legal profession as a person fit to be consulted by others and to act in matters of trust and confidence. We therefore increase the discipline in this case to a suspension of 180 days and until Respondent has satisfactorily demonstrated his understanding of those standards and his fitness to return to the practice of law to the satisfaction of a hearing panel in reinstatement proceedings authorized by MCR 9.123(B) and MCR 9.124.

Concurring: Martin M. Doctoroff, Remona A. Green, Hanley M. Gurwin, Patrick J. Keating, Odessa Komer, and Charles C. Vincent, M.D.