GRIEVANCE ADMINISTRATOR,
Petitioner/Appellant,

RICHARD E. GONIWICHA,
Complainant/Appellant,

v

CLINTON C. HOUSE, P-15858,
Respondent/Appellee.

ADB 114-89

Decided: July 30, 1990

BOARD OPINION

The complainant and the Grievance Administrator have filed petitions for review in accordance with MCR 9.118 seeking review of a hearing panel's decision to dismiss a two-count formal complaint in this matter. The complaint charged in Count I that the respondent commingled and misappropriated the proceeds of a civil judgment received on behalf of a client. The second count alleged that the respondent made material misrepresentations to the Grievance Administrator in his answer to the Request for Investigation. Based upon its review of the whole record, the panel's decision to dismiss Count II is affirmed.

It is the Board's conclusion, however, that the dismissal of Count I was not warranted in light of the evidence pertaining to the respondent's inadequate maintenance and supervision of his client trust account during the period in question. The fact that the misconduct may have resulted from the acts or omissions of respondent's employees should be given substantial weight in mitigation but should not completely excuse his failure to oversee the client funds entrusted to his care. A reprimand is an appropriate discipline in light of the facts in this case.

The hearing panel assigned to the trial of this contested matter received the testimony of six witnesses including the respondent, Clinton House, the complainant Richard E. Goniwicha, a representative of the bank where respondent's trust account was located and three former or current secretaries employed by Mr. House.

There is virtually no dispute as to the facts regarding the respondent's receipt, maintenance and disbursement of funds received on behalf of his client. The respondent represented Mr. Goniwicha in a civil matter which resulted in a judgment in Goniwicha's favor in January 1987. The respondent received two separate checks, each in the amount of $500, from the defendant in January and February of 1987. He testified that a statement for services had been sent to his client in 1986. Mr. Goniwicha had disagreed with certain items which appeared on the statement and expressed his dissatisfaction with the respondent's representation. The respondent testified that he took no immediate action to deposit the two checks, partly because he

hoped to resolve the fee dispute and partly because he was in the process of dissolving his law partnership and establishing his own firm. The checks remained in a drawer, uncashed, until they were deposited in July 1987.

Although the complaint filed by the Grievance Administrator charged that the funds were commingled with the respondent's own monies, that issue has not been pursued. At the time the funds were deposited, the account in question was not specifically denominated a "trust account" on the bank records but there is unrebutted testimony that it was, in fact, used solely as a separate account meeting the requirements of Canon 9 of the Code of Professional Responsibility. The issue of commingling is not present in this case.

The bank records introduced into evidence show that the balance in the respondent's account first fell below $1000 in January 1988 when the account fell to $979.25. By December 30, 1988, the balance stood at $323.15. The balance remained below $1000 through January and February 1989.

On March 21, 1989, the respondent replied to the Request for Investigation filed by Mr. Goniwicha and served by the Grievance Administrator by stating that his client's $1000 had been in his client trust account and was still there. He testified to the panel that he did not become aware that there had been shortages in the account until after the filing of the formal complaint. At some time after the filing of the complaint, the respondent also took steps to resolve the fee dispute by filing suit against his client.

Based upon the testimony of the respondent, the complainant and the bank officer, there is simply no question that the funds which should have been maintained in a separate identifiable bank account were not properly maintained there and that the respondent's reply to the Request for Investigation was not entirely accurate. The respondent argues that those facts do not necessarily support a conclusion that the respondent engaged in professional misconduct. It is his position that the operation and review of the trust account was entirely delegated to his staff and that an inexperienced secretary mistakenly drew several checks from that account. He maintains that he had no personal knowledge that the funds were not always in the account and that, to the best of his knowledge, the funds were there when he submitted his statements to the Grievance Administrator.

The evidence submitted in support of respondent's position is unrebutted. Three former or current secretaries testified that they handled the trust account, that the monthly statements were not regularly reconciled with the trust account ledgers, that they had no explicit instructions on how to maintain the account and that several checks were, in fact, mistakenly drawn on the account. Those checks were retainer refunds to clients and there is no evidence in the record that the checks were drawn from the account at the specific direction of or with the knowledge of the respondent. The bank officer testified that the checks which he was able to locate were all signed by respondent's employees and not by the respondent personally. Mr. House testified that he never looked at the monthly statements for that account from July 1987 to March 1989.

The hearing panel's report states that the dismissal of Count I is based upon its

consideration of the record and specific reference is made to the testimony of the respondent and his employees. Since the evidence establishes that money belonging to client Richard Goniwicha was not, in fact, maintained intact in a separate account as required by Canon 9, review of the panel's decision on this issue turns on this question: Is an attorney strictly liable for the mishandling of client funds or can such liability be avoided by establishing that responsibility for client funds was delegated to employees?

The Board has previously ruled that an attorney is personally responsible for the fiduciary duties owed to a client. In Matter of Leonard Baun, #32207-A, Brd. Opn. p. 12 (1979) [revocation affirmed for commingling and conversion] the Board stated:

> Whether the commingling and conversion of funds was done as the result of some planned conscious scheme or was the result of careless bookkeeping, the evidence remains uncontroverted that respondent knew, or very certainly should have known, that he was failing to carry out his duties as fiduciary. However, even if an employee of Baun embezzled the funds (suggested as a possibility by Baun) and regardless of the presence of fraud by the fiduciary himself, failure to keep and monitor separate accounts violates . . . the disciplinary rules. Regardless whether a conscious specific intent to convert the funds or mere sloppiness and carelessness is the true explanation, there remains a very serious breach of the fiduciary duty and the Canons of Ethics.

A more extensive discussion of an attorney's culpability for acts of an employee is set forth in the Board's 1979 opinion in Matter of James H. Hudnut, #34884-A. Brd. Opn. p. 30 (1979). The Board noted:

> Attorneys have been held responsible for any and all acts of their employees. In Black v State Bar of California, 499 PA2d 968 (1972), an attorney's secretary embezzled a large amount of money from the office trust account and vanished. Although the attorney was not criminally culpable, he was disciplined for the acts of his employee. See also Vaughn v State Bar of California, 494 PA2d 1257 (1972).

In Matter of Michael J. Kavanaugh, DP 71/84, Brd. Opn. p. 382 (1985), the Board affirmed a hearing panel's finding of misconduct where, during the absence from his office, a check payable to his client was endorsed and deposited by an office employee into respondent's general firm account. When respondent returned and became aware of the error, he issued a check to the client. It was shown that during his absence, the balance in respondent's account fell below the amount of the check and respondent had to place additional money into the account. The Board stated:

> The erroneous deposit of client funds by respondent's employees

> does not constitute an aggravated or severe breach of trust. Respondent made timely efforts to rectify this error; if he had not done so, a greater sanction would be in order. Even though it was a mitigated and technical violation of DR 9-102(A), it cannot be excused simply because it was carried out by office personnel. Attorneys may be responsible, for discipline purposes, for the acts and omissions of their employees who must be properly trained and supervised, especially with regard to the handling of client property. (emphasis added)
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> [Kavanaugh was reprimanded by the panel for that "technical" violation. On appeal, the Board increased to a sixty-day suspension based upon misconduct alleged in two additional counts]

Regardless of one's sympathies for Mr. House, the panel's dismissal of the complaint is inconsistent with prior rulings of the Board. See also the Board's recent opinions in Matter of Steven Lupiloff, DP 34/85, (3/24/88); Matter of William W. Swor, ADB 118-87, (3/16/89); and Matter of Robert Cummins, ADB 158-88, (12/5/88).

Count II of the complaint, charging that the respondent made a misrepresentation in his answer to the Request for Investigation presents a different issue. The respondent has essentially relied on his ignorance of and his bank account records as a defense. According to his testimony, he did not consult the bank records when he drafted his response to the Request for Investigation in March 1989 and he claims to have no idea that there had been shortages in the account until after the formal complaint was filed in August 1989. We would hope that an attorney might feel that the duty to make a "full and fair disclosure" in an answer to a Request for Investigation includes taking the time necessary to verify that the information is correct. In this case, however, the respondent's testimony that he "assumed" his answer was true is unrebutted. It is noted that the complaint filed by the Grievance Administrator charged that his statements were made "knowingly". The hearing panel's conclusion that the charges in that account were not established by a preponderance of the evidence is affirmed.

The Board has ruled that "misappropriation" is essentially a per se offense which occurs when the account balance falls below the minimum amount required. See Matter of Steven J. Lupiloff, supra citing In re E. David Harrison, 461 AT2d 1034 (1983). This is not to say that the circumstances in this case should not be given considerable weight in mitigation. The imposition of a reprimand in this case is consistent with the discipline imposed in prior cases where a technical misappropriation was the result of neglect of inadvertence.

John F. Burns, Hon. Martin M. Doctoroff, Remona A. Green, Hanley M. Gurwin and Linda S. Hotchkiss, M.D.

DISSENTING OPINION

Robert S. Harrison, joined by Theodore P. Zegouras

I would affirm the hearing panel's decision to dismiss the complaint in this case. While the respondent's failure to supervise his employees cannot be condoned, that failure should not warrant professional discipline. I see no benefit to the public or the legal profession by holding this attorney out as an example simply because, in hindsight, he did not pay close enough attention to the day-to-day bookkeeping of his secretarial staff.